OA 11-8-90

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,831

THE STATE OF FLORIDA,

Petitioner.

vs.

CANDICE JEAN SCHUCK,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

****

REPLY BRIEF OF THE STATE ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Chief, Criminal Law,
West Palm Beach Bureau
Florida Bar No. **339067**

Co-Counsel for Petitioner

JOHN TIEDEMANN
Assistant Attorney General
Florida Bar No. **319422**
111 Georgia Avenue, **Suite** 204
West Palm Beach, Florida **33401**
Telephone: **(407) 837-5062**

Co-Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

TABLE OF CITATIONS (CONTINUED)

CASES **PAGE**

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below in Schuck v. State, infra, and the petitioner here, will again be referred to as "the State." Candace Jean Schuck, the criminal defendant and appellant below, and the respondent here, will again be referred to as "respondent."

References to the four-volume record on appeal and certiorari will again be designated "(R:)." References to prior papers filed in this cause will again be designated by their titles.

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

STATEMENT OF THE CASE AND FACTS

The State stands upon the "statement of the case in facts" found at pages 2-6 of its "Initial Brief...on the Merits," which respondent basically accepted; and will explain in the argument portion of this brief why the "additions and clarifications" to this statement posited by respondent at pages 2-3 and 13-14 of her "Answer Brief on the Merits," wherein she maintains that the record contains factual support for her allegation that her jury could have found that the killing she committed was an excusable homicide rather than a manslaughter, are misfocused.

SUMMARY OF ARGUMENT

The State remains convinced that 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 under this Court's decisions of Banda v. State, infra, and Rojas v. State, infra.

ISSUE

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

ARGUMENT

In its initial brief in this cause, the State explained that the Fourth District reversibly erred by granting respondent a new trial on her manslaughter charge in Schuck v. State, 556 So.2d 1163, 1164 (Fla. 4th DCA 1990), review granted, Case No. 75,631 (Fla. 1990) because Broward County Circuit Judge Robert Tyson did not err, fundamentally or otherwise, in instructing her jury on excusable homicide in defining manslaughter (R 474-477).

The State pointed out that the first prong of respondent's claim, that the trial judge fundamentally erred by giving her jurors the "short" definition of excusable homicide in defining manslaughter found at page 61 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) because it allegedly incorrectly implied that this defense can never 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 (Fla. 1988), cert. denied, ___U.S.___, 109 S.Ct. 1548 (1989) that such an instruction is not prejudicial to a defendant where no evidence is introduced to support an excusable homicide defense.

Respondent cannot seriously believe that her confession that she used the instant shotgun to kill Mark Hamilton by pointing it at the back of the victim's head and discharging it (R 353-354, 359)[1] exempts her from the scope of the Banda v. State holding, and her contention that the prosecutor's references to these facts in his closing argument (R 442, 451-452, 460-461) misimplied that no one can ever commit an excusable homicide with a dangerous weapon as a matter of law ("Respondent'sAnswer Brief on the Merits," pages 11 and 13), are quite lame. Compare Hines v. State, 227 So.2d 334, 335 (Fla. 1st DCA 1969), Marasa v. State, 394 So.2d 544 (Fla. 5th DCA 1981), review denied, 402 So.2d 613 (Fla. 1981), Berry v. State, 547 So.2d 969, 971-972 (Fla. 3rd DCA 1989) and Dominique v. State, 435 So.2d 974 (Fla. 3rd DCA 1983).

The State in its initial brief also pointed out that the second prong of respondent's claim, that the trial judge fundamentally erred by giving her jurors the "short" definition

---

[1] Respondent directly confessed her criminal culpability to Detective Robert Williams the night Mr. Hamilton was killed as follows:

> I picked up the gun [which I didn't think was loaded] and I was acting like I was going to shoot [Hamilton] and I looked at [Violet Gulli] and I says, 'watch this.' I says 'bang,' and I looked and he fell....[I had pointed the gun at the victim] just faking, just playing, because....he wouldn't tell me he loved me.

(R 353-354, 359). The fact that the detective did not recollect at trial that respondent had admitted to him him that she had aimed the gun at the victim (R 336-337), and that Violet Gulli did not see whether respondent had aimed the gun or not (R 165), cannot logically vitiate the force of the best evidence on this question, respondent's contemporaneous sworn confession.

of excusable homicide in defining manslaughter because it incorrectly implied that excusable homicide cannot involve the use of a dangerous weapon, thus purportedly 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 (Fla. 1989) that a trial judge who follows a full 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. Respondent cannot escape the import of Rojas v. Stale merely by pointing out that that particular defendant's second degree murder conviction was reversed due to that judge's omission of the aforequoted language in instructing that jury on manslaughter, since the instant judge, unlike the Rojas v. State judge did, for obvious reasons, fully instruct her jury on excusable homicide in defining manslaughter (R 474-477).

The State will close now by making three somewhat related observations. First, as demonstrated, the respondent in the instant case had no arguable leqal defense to committing the manslaughter of Mr. Hamilton; she went to trial seeking a jury pardon based on the perceived inequities of her romantic rejection by the victim, as was her right, see e.g. Reddick v. State, 380 So.2d 1330, 1332-1333 (Fla. 5th DCA 1980), quashed on other grounds, 394 So.2d 417, 418 (Fla. 1981). Second, if this

Court feels in the abstract that the respondent here has a legitimate complaint concerning the propriety of its standard jury instructions on manslaughter, it might consider clearing up this much-litigated area of the law once and for all by amending these instructions to specify exactly what constitutes proper instructions on this residual crime in all conceivable scenarios in its opinion in this case, compare Hedges v. State, 172 So.2d 824, 826 (Fla. 1965) and State v. Whitfield, 487 So.2d 1045, 1047 (Fla. 1986). Third, even if this Court concludes that the instructions Judge Tyson read respondent's jurors were severely erroneous, it should still reverse the Fourth District's decision in Schuck v. State both because the judge provided her jurors with an indisputably correct instruction on the defense of excusable homicide immediately before they retired to deliberate (R 477-478), see Florida Standard Jury Instructions in Criminal Cases, page 76, thus curing any earlier error, see Johnson v. State, 252 So.2d 361, 364 (Fla. 1971), modified on other grounds, 408 U.S. 939 (1972); and more significantly because, as respondent commendably if tacitly concedes, she "completely concurr[ed]" with the judge's proposal that her jurors be earlier instructed on the substantive offense of manslaughter exactly as they were (R 389-394, 412-413, 474-477, 487). Axiomatically, "Florida courts follow the 'invited error' rule, which stands for the proposition that [a party] may not take advantage of an error which [s]he has induced," Ellison v. State, 349 So.2d 731, 732 (Fla. 3rd DCA 1977), cert. denied, 357 So.2d 185 (Fla. 1978). Or, as Judge Alan Schwartz of the Third District inimitably

phrased it, "the courts [should] not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed," Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337, 1339 (Fla. 3rd DCA 1979), cert. denied, 378 So.2d 342 (Fla. 1979).

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, again 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,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

John Tiedemann for

JOAN FOWLER
Senior Assistant Attorney General
Chief, Criminal Law,
West Palm Beach Bureau
Florida Bar No. **339067**

Co-Counsel for Petitioner

John Tiedemann

JOHN TIEDEMANN
Assistant Attorney General
Florida Bar No. **319422**
111 Georgia Avenue, Suite **204**
West Palm Beach, Florida **33401**
(407) 837-5062

Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by mail to: MARCY K. ALLEN, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 6th day of September, 1990.

John Tiedt

Of Counsel

:mm