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FILED
SID J. WHITE
APR 26 1991
CLERK, SUPREME COURT
By [Signature]
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 77,059

LESTER LEWIS GIBSON,

Respondent.

MERITS BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The petitioner, State of Florida, was the prosecuting authority in the trial court and the appellee in the district court of appeal and will be referred to here as "State." The respondent, Lester Lewis Gibson, was the defendant in the trial court and the appellant in the district court of appeal and will be referred to here by his last name.

The seven-volume record on appeal will be referred to by the symbol, "R," the first supplemental record on appeal, consisting of transcripts of the several competency hearings, by the symbol, "SR," and the second supplemental record, consisting of two psychological reports, by the symbol, "SSR," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Gibson was indicted for several offenses, one of which was first-degree murder (R. 1), and he was convicted of the lesser included offense of second degree murder (R. 251). His theory of defense was excusable homicide; i.e., that he shot the victim accidentally. (R. 1221, 1225, 1245, 1247, 1288, 1290-91) He did not claim justifiable homicide. (R. 1285)

Without objection, the trial court instructed the jury, in pertinent part, as follows:

In this case Lester Lewis Gibson is accused of murder in the first degree, I will instruct you on these offenses separately.

Murder in the first degree includes the lesser crimes of murder in the second degree and manslaughter, all of which are unlawful. A killing that is excusable or is committed by the use of justifiable deadly force is lawful.

If you find Tony Harrell was killed by Lester Lewis Gibson, you will then consider the circumstances surrounding the killing in deciding if the killing was murder in the first degree, murder in the second degree, or manslaughter, or whether the killing was excusable or resulted from justifiable use of deadly 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 in which the defendant was at the time of the killing. 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, upon

any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

(R. 1291-1293)

Thereafter, the trial court instructed the jury on the elements of first-degree murder, second degree murder, and manslaughter. (R. 1293-1294) After defining the elements of manslaughter, the trial court informed the jury that "the defendant cannot be guilty of manslaughter with a firearm if the killing was either justifiable or excusable homicide as I have previously explained those terms." (R. 1296) Defense counsel never requested any other instructions on excusable homicide. (R. 1218, 1319)

On appeal to the First District, Gibson argued that the trial court committed fundamental error by omitting the long-form standard jury instruction on excusable homicide. The appellate court agreed. It reached two conclusions - first, that the short form standard jury instruction on excusable homicide was misleading and second, that the trial court had an affirmative duty, on its own motion, to instruct on excusable homicide using the long-form standard jury instruction. Gibson v. State, 568 So.2d 977 (Fla. 1st DCA 1990).

SUMMARY OF ARGUMENT

The issue presented here is controlled by State v. Smith, infra, decided subsequent to the publication of the district court's opinion in the instant case. The trial court has no affirmative duty, sua sponte, to instruct on the unrequested long-form standard jury instruction on excusable homicide where the short-form instruction is given.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S FAILURE TO GIVE
UNREQUESTED LONG-FORM INSTRUCTION ON
EXCUSABLE HOMICIDE CONSTITUTED FUNDAMENTAL
ERROR WHERE SHORT-FORM INSTRUCTION WAS
GIVEN.

This issue is controlled by State v. Smith, 573 So.2d 306 (Fla. 1990), in which this court stated, in pertinent part, the following:

The issue before the district court of appeal with respect to the first question was whether it was fundamental error not to give the long-form instruction on excusable homicide when there was evidence to support that defense. In this respect, we agree with the district court when it said that to hold fundamental error occurred because of the failure to give the long-form instruction on excusable homicide when it was not requested "would place an unrealistically severe burden upon trial judges concerning a matter which should properly be within the province and responsibility of defense counsel as a matter of trial tactics and strategy."

In normal cases the failure to request an instruction precludes a later contention that such instruction should have been given. ... Here, the trial judge gave the short-form instruction on excusable homicide. The failure to give the long-form instruction when it was not requested did not constitute fundamental error. [citations omitted]

Id., at 310.

The facts in Smith are identical to those in the instant case. The trial court gave the standard jury instructions on homicide, including the short-form definition of excusable homicide. The long-form instruction on excusable homicide was


not given. Defense counsel raised no objection to the instructions that were given, and neither did he request the trial court to give the long-form instruction on excusable homicide.

CONCLUSION

The State respectfully requests this Honorable Court to quash the district court's opinion reversing Gibson's murder conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. Mail to Nancy A. Daniels, Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 26th day of April, 1991.


Carolyn J. Mosley
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