047 w/app

IN THE SUPREME COURT OF FLORIDA

ORLANDO HERRERA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,290

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

ALLEN J. DeWEESE
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA CONSTITUTION

UNITED STATES CONSTITUTION

PRELIMINARY STATEMENT

Petitioner was the defendant in the criminal division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant in the Fourth District Court of Appeal. Respondent was the prosecution in the Circuit Court and the appellee in the District Court of Appeal.

In this brief, the parties will be referred to as Petitioner and Respondent.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE

Petitioner was convicted of trafficking in cocaine over 400 grams and resisting arrest without violence (R 1537, 1581). He appealed to the Fourth District Court of Appeal, which affirmed on two issues, peremptory challenges of black jurors and the standard jury instruction placing the burden on the defense to prove entrapment, and reversed on one issue, imposition of a consecutive sentence outside of the guidelines. The opinion was filed May 8, 1991 (Appendix to this brief).

A timely motion for certification was filed, and by order of June 21, 1991, the District Court certified the following question (Appendix):

> Do Instruction 3.04(c)(2), Florida Standard Jury Instructions in Criminal Cases, and Section 777.201(2), Florida Statutes (1989), both applicable to offenses after 1987, unconstitutionally shift the burden to the defense to prove entrapment?

Notice of Intent to Invoke Discretionary Jurisdiction was filed July 17, 1991 (Appendix).

By order of July 25, 1991, this Court ordered briefing on the merits but postponed its decision on jurisdiction.

STATEMENT OF THE FACTS

Petitioner was charged and tried for trafficking and conspiracy along with two co-defendants, Rafael Castillo and Janette Dempster, who were acquitted (R 1523-1524). The arrests were made in a sting initiated by a confidential informant. Petitioner asserted the defense of entrapment (R 651).

At trial, Officer Mintus testified that he was brought into contact with Petitioner by the confidential informant when Mintus was working undercover. Mintus got approval to try to involve Petitioner in a cocaine deal and then rented a hotel room for this purpose. Mintus had the informant, who had been arrested a few days before and was now helping the police, call Petitioner from the hotel room (R 524-533, 648-649). In the afternoon Petitioner came to the hotel room and the informant introduced him to Mintus (R 534-536).

Petitioner agreed to sell Mintus one kilo of cocaine for $17,000. Mintus showed him $4,000 and said he would get the rest of it when Mintus saw the cocaine. Petitioner made several phone calls from the room. He then said he could only sell half a kilo for $10,000. Petitioner said it would be delivered to him home and that he would then bring it to the hotel. Petitioner left at 4:00 (R 537-544).

At 7:00 Petitioner returned. He met Mintus and the informant in the hotel room and then took them down to the parking lot (R 545-546). Waiting at the car to which Petitioner led them were Castillo, Dempster, and Petitioner's four year old son (R 551-552).

Mintus asked Castillo if it was good stuff. Castillo winked and smiled but didn't say anything. Petitioner and Mintus got in the front seat of the car, while Castillo waited outside (R 554-556).

Petitioner pulled a half kilo bag from the floor of the car, offered it to Mintus, told him to try it, and said it was good (R 560). Mintus gave the arrest signal to nearby officers who were monitoring his bodybug, and after some delay they moved in (R 561-566). Petitioner ran off but was chased and caught (R 570).

Petitioner testified on his own behalf that Mintus's confidential informant was known to him as Johnny. Petitioner had taken his car for repairs to Johnny's brother, Zahed. Petitioner had gotten to know the two men. They had an expensive life style and talked about drug dealing. They asked him to get involved, but he always refused (R 1005-1009).

The day before Petitioner was arrested, Johnny and Zahed insisted that Petitioner become involved. He was afraid of them because they made threats to him and they had many firearms. They made threats against Petitioner's family, his wife and child. Petitioner agreed the night before because of the pressure and fear for his family (R 999, 1009, 1018, 1020, 1022-1023).

Johnny and Zahed told Petitioner how to act and how to conduct the deal. In the morning, Johnny called and told him to meet him at Mintus's hotel. Petitioner wanted to get out of it, but the men had guns and he was afraid. He went to the hotel and tried to act like a drug trafficker. Johnny was already there and Mintus's room (R 1022-1025). Petitioner made some phone calls in Spanish which had nothing to do with the deal; it was just that he could make

them for free from the hotel. He tried to call Castillo, but he was not home, so he spoke to someone else there. Petitioner went home (R 1027-1031).

A friend of Zahed's brought the cocaine to Petitioner's house. Petitioner put it under the seat of his car. Castillo and Dempster just happened to show up as he was about to leave, so he invited them along. Petitioner also took his son because he had no one to leave him with (R 1032-1035).

Petitioner returned to the hotel, led Mintus and Johnny down to his car, and gave the cocaine to Mintus. Petitioner ran when the police moved in because Mintus and Johnny ran; Petitioner thought they were being held up (R 1038-1042).

At the jury charge conference, the defense objected to the standard instruction on entrapment, contending that it improperly placed the burden of proof to prove entrapment on the defense (R 1308-1315, 1511). The defense argued entrapment in closing argument (R 1346, 1459). The jury was instructed on entrapment as follows (R 1496-1498):

> Orlando Herrera has raised the defense of entrapment.
>
> This means that Orlando Herrera claims he had no prior intention to commit the offense and that he committed it only because he was persuaded or caused to commit the offense by law enforcement officers.
>
> Orlando Herrera was entrapped if he was, for the purpose of obtaining evidence of the commission of a crime, induced or encouraged to engage in conduct constituting the crime of trafficking in cocaine over four hundred grams and he engaged in such conduct as the direct result of such inducement or encouragement and the person who induced or encouraged him was a law enforcement officer or a person engaged in cooperating with or acting as an agent of

a law enforcement officer and the person who induced or encouraged him employed methods of persuasion or inducement which created a substantial risk that the crime would be committed by a person other than one who was ready to commit it and Orlando Herrera was not a person who was ready to commit the crime.

It is not entrapment if Orlando Herrera had the predisposition to commit the crime of trafficking in cocaine over four hundred grams.

Orlando Herrera had the predisposition if before any law enforcement officer or person acting for the law enforcement officer persuaded, induced or lured Orlando Herrera, he had a readiness or willingness to commit trafficking in cocaine over four hundred grams if the opportunity presented itself.

It is also not entrapment merely because a law enforcement officer, in a good faith attempt to detect crime, provided Orlando Herrera the opportunity, means and facilities to commit the offense for which the defendant Orlando Herrera intended to commit and would have committed otherwise or used tricks, decoys or subterfuge to expose the defendant's criminal acts or was present and pretending to aid or assist in the commission of the offense.

On the issue of entrapment, the defendant Orlando Herrera must prove to you by a preponderance of the evidence that his criminal conduct occurred as the result of an entrapment.

If you find from the evidence that Orlando Herrera was entrapped or if the evidence raises a reasonable doubt about his guilt, you should find him not guilty.

If you have no reasonable doubt, you should find him guilty.

Preceding the entrapment instructions, the following instructions were given on presumption of innocence, burden of proof, and reasonable doubt (R 1494-1496):

The defendants have entered a plea of not guilty. That means that you must presume or believe each defendant is innocent.

The presumption stays with each defendant, as to each material allegation in the Information, through each stage of the trial, until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome a defendant's presumption of innocence, the State has burden of proving the following two elements:

First: The crime with which each defendant was charged was committed.

Second: That the defendant is the person who committed the crime.

The defendants are not required to prove anything.

Whenever the words reasonable doubt are used, you must consider the following:

A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt.

Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

On the other hand, if after carefully considering, comparing and weighing all of the evidence, there is not an abiding conviction of guilt or if having a conviction, it is one which is not stable but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced during this trial and to it alone that you are to look for that proof.

A reasonable doubt as to the guilt of any or all or both of the defendants may arise from the evidence, a conflict in the evidence or a lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, should should [sic] find the defendant guilty.

The following facts are relevant to Point II in this brief:

During jury selection, four black people were on the venire panel. Only one, Willie Joe Lewis, served on the jury (R 387, 402). Two of the others, Lolita Hawkins and Jewel Thomas, were struck by the state. Co-defendant Janette Dempster struck the remaining one, Anthony Canady (R 379, 385, 393, 396-397). The strikes were upheld by the trial court over defense objection (R 379-397).

The prosecutor asked no questions of any of the four black panel members during voir dire. Counsel for Janette Dempster asked no questions of Canady. Upon examination by the court, Ms. Hawkins stated that she lived in Delray Beach, went to school at Florida Atlantic University, worked as a student assistant in research, and was single (R 98). Mr. Canady stated that he lived in Riviera Beach, worked for the City of West Palm Beach, and was married with two children (R 103). Ms. Thomas stated that she lived in Riviera Beach, worked for the Palm Beach County Division of Human Services, and had one adult child (R 135). Of the other panel members interviewed, two were single (R 95, 102), one was a teacher (R 142), and one was a nursing assistant (R 148).

When called upon to give reasons for the state's strikes, the prosecutor stated the following regarding Ms. Hawkins (R 382-383):

> MS. QUEVEDO [Prosecutor]: She is single, she is young, just like Susan Taylor, who I struck. I don't want young jurors. I think they're not going to be mean enough.
>
> She acted completely annoyed, hasn't laughed about anything, just rolls her eyes. She is just annoyed with the whole process.

The prosecutor stated the following regarding Ms. Thomas (R 393):

> MS. QUEVEDO: Division of Youth Services, lives in Riviera Beach. I'd like to get to Jeannie Marie Thomas who is a person I want.

The prosecutor initially challenged Mr. Canady also, but the challenge was denied by the court. The reasons given by the prosecutor were (R 388):

> MS. QUEVEDO: I didn't ask him enough questions. No one asked him anything which I should have. It is Riviera Beach, bad police relationships there. I don't think -- conservative.

Counsel for Dempster adopted these reasons and in addition stated the following when called upon to give reasons for striking Mr. Canady (R 397):

> MR. GOMBERG [Counsel for co-defendant Dempster]: I share the reasons of the state.
>
> THE COURT: Announce those again.
>
> MR. GOMBERG: I don't think, given his background and his youth, that he is likely to be tolerant of the sorts of behavior that would be testified to in this case and be fair and impartial concerning by client.

SUMMARY OF ARGUMENT

I.

The new standard jury instruction on entrapment, and the statute upon which it is based, are unconstitutional. Under the Florida Constitution, both the instruction and the statute improperly shift the burden of proof to the defendant to prove entrapment. Under the United States Constitution, although the statute is not unconstitutional on its face, the jury instruction is unconstitutional because the jury is not also instructed that it must consider all the evidence in first determining whether the state has met its primary burden of proving beyond a reasonable doubt that the defendant has committed the crime charged.

II.

The trial court improperly allowed three peremptory challenges of black jurors, two by the state and one by the co-defendant. The reasons given for the challenges were all either without record support or otherwise legally improper.

ARGUMENT

POINT I

INSTRUCTION 3.04(c)(2), FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, AND SECTION 777.201(2), FLORIDA STATUTES (1989), BOTH APPLICABLE TO OFFENSES AFTER 1987, UNCONSTITUTIONALLY SHIFT THE BURDEN TO THE DEFENSE TO PROVE ENTRAPMENT.[1]

A. Florida Constitutionality

This Court in 1989, in response to the enactment of Section 777.201(2), Florida Statutes (1987), provisionally approved a new standard jury instruction shifting the burden of proof on entrapment to the defendant. In re Standard Jury Instructions in Criminal Cases, 543 So.2d 1205, 1208 (Fla. 1989). The new instruction, tracking the statute, states, "On the issue of entrapment, the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as a result of entrapment." The old instruction stated, "On the issue of entrapment, the state must convince you beyond a reasonable doubt that the defendant was not entrapped."

This Court, in adopting the new standard instruction, explicitly declined to pass on its constitutionality or on the constitutionality of Section 777.201(2). In a footnote on page 1208 of this Court's opinion In re Standard Jury Instructions in Criminal Cases, supra, this Court noted that the statute does place

---

[1] This question was certified to this Court because a similar issue was already pending in this Court in State v. Krajewski, Case No. 77,685. The argument in this brief under subheading B of this point on appeal is essentially the same as the argument of the defense in Krajewski. The argument here under subheading A, however, is not. The arguments here are also before this Court in Deleon v. State, Case No. 78,299.

the burden of proof of entrapment on the defendant, but stated that for the limited purpose of adopting the standard instructions the statute's constitutionality must be assumed. This Court stated, "The court deems it inappropriate to pass on the constitutionality of a statute except in adversary proceedings."

The instant case presents the constitutionality of the instruction and the statute in an adversary proceeding appropriate for a decision on constitutionality.

In the instant case, over defense objection (R 1308-1318), the trial court instructed the jury in accordance with the new instruction placing the burden on the defendant (R 1498). The defense had specifically objected to the new instruction's placement of the burden of proof on Respondent (R 1311). The defense also asserted entrapment as its defense and argued it to the jury (R 651, 1346, 1459, 1511). The defense is entitled to have the jury correctly instructed on its theory of defense. Stiglitz v. State, 270 So.2d 410 (Fla. 4th DCA 1972). It is always the responsibility of the trial judge to correctly instruct the jury in each case, and the approval of a standard jury instruction does not relieve the trial judge of this responsibility. In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 598 (Fla. 1981).

This Court's decisions on the previous versions of the standard entrapment instruction demonstrate that the new instruction and the statute are unconstitutional under the due process clause of the Florida Constitution because of the burden shift. Article I, Section 9, Florida Constitution. The Florida due process clause offers greater protection to its citizens from

police overreaching than does the Federal Constitution. State v. Glosson, 462 So.2d 1082, 1084-1085 (Fla. 1985).

First, in State v. Wheeler, 468 So.2d 978 (Fla. 1985), this Court adopted the following four-step statement of the burden of proof in an entrapment case:

> (1) the defendant has the burden of adducing any evidence of entrapment;
>
> (2) the trial court determines the sufficiency of the evidence of entrapment;
>
> (3) if the evidence of entrapment is sufficient the jury must be instructed that the state has the burden of disproving entrapment beyond a reasonable doubt; and
>
> (4) the jury should never be instructed on the defendant's burden of adducing evidence.

Steps three and four are governing in the instant case. Following steps one and two, the trial court did determine that entrapment should be submitted to the jury; under steps three and four the court erred, however, in giving an instruction placing the burden on the defense.

Next, in Rotenberry v. State, 468 So.2d 971 (Fla. 1985), this Court approved the then-current version of the standard jury instruction:

> If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty.

This Court held that this instruction was adequate because it was given in combination with the general instructions on burden of proof and reasonable doubt, which placed the burden of proof on the state. See also McCray v. State, 478 So.2d 203 (Fla. 1985), approving McCray v. State, 433 So.2d 5 (Fla. 4th DCA 1983).

After Rotenberry, however, this Court returned to the original pre-Rotenberry standard instruction, which explicitly placed the burden of proof on the state to establish beyond a reasonable doubt that the defendant was not entrapped. The Florida Bar re Standard Jury Instructions-Criminal, 508 So.2d 1221 (Fla. 1987). The instruction then adopted was the one termed the "old" instruction in this brief. It was in effect until the 1987 adoption of Section 777.201(2). The instruction stated:

> On the issue of entrapment, the state must convince you beyond a reasonable doubt that the defendant was not entrapped.

This, Petitioner submits, is the correct statement of the law. Certainly the new instruction would not have passed muster under Wheeler and Rotenberry. Wheeler stated, "When the defendant has adduced sufficient evidence to make a prima facie case of entrapment, the burden of proof regarding entrapment shifts entirely to the state. After the burden has shifted, no consideration of the defendant's initial burden is permissible." 468 So.2d at 981 (emphasis added). Plainly the new jury instruction is improper further consideration. Rotenberry approved an instruction which in fact made no comment on the burden of proof one way or the other:

> If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty.

468 So.2d at 972. Based as it was on other instructions clearly placing the burden of proof on the state, the Rotenberry decision would not have approved the new instruction squarely placing the burden on the defense.

Wheeler is still good law and should not be overruled by this Court. Although Wheeler was based at least in part on decisions of the United States Supreme Court, 468 So.2d at 980-981, and although the federal law does not go as far as the Florida Constitution (see subheading B below), nonetheless the federal cases still provide the basic underpinning for this Court's prior rulings, while the Florida Constitution requires more. State v. Glosson, supra. Having previously approved a jury instruction squarely and properly placing the burden of proof on the state, this Court must now disapprove the new instruction shifting that burden one hundred eighty degrees to the defense.

This Court must also hold the provision of the statute placing the burden on the defense to be unconstitutional, or, in the alternative, hold that no jury instruction is authorized by it or may be based upon it. Certainly in the instant case, the statute and instruction must be evaluated in tandem, since the instruction transmitted the statute to the jury, thereby giving its practical effect in the trial. This effect must be the paramount consideration. The effect of burden-shifting jury instructions must be determined by the way in which a reasonable juror could have interpreted the instruction. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Here, a reasonable juror would interpret the new entrapment instruction as placing the burden of proof on the defendant.

A final note. It is true in the instant case that the trial court gave not only the new unconstitutional instruction, but along with it also the former instruction approved by Rotenberry (R 1498). However, as noted above, the Rotenberry instruction makes

no statement one way or another on the burden of proof. Therefore, that instruction was ineffective in the instant case to overcome the strongly worded new instruction placing the burden on the defense. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity; a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied. Francis v. Franklin, 471 U.S. 311, 322; 105 S.Ct. 1965, 1975; 85 L.Ed.2d 344, 358 (1985). Trial courts should not give instructions which are confusing, contradictory, or misleading. Butler v. State, 493 So.2d 451, 452 (Fla. 1986). The court should not give a correct instruction and then, in the next breath, give one which is diametrically opposed. Shannon v. State, 463 So.2d 589, 590 (Fla. 4th DCA 1985).

B. Federal Constitutionality.

Respondent must concede that under the United States Constitution, unlike the Florida Constitution (subheading A above), Section 777.201(2), Florida Statutes (1987), is not necessarily unconstitutional on its face. However, the United States Supreme Court has made it clear that it is constitutionally permissible to place upon the defendant the burden of proving an affirmative defense by a preponderance of the evidence only if the jury is carefully instructed that it must consider all the evidence, including that of the affirmative defense itself, in first determining whether the state has met its primary burden of proving beyond a reasonable doubt that the defendant has committed the crime charged. The jury instructions in the instant case do not meet these standards, so that the instructions were a violation of

the federal due process clause. Fifth and Fourteenth Amendments, United States Constitution. Additionally, the statute was unconstitutional as applied in the instant case, because it was the basis for the instruction.

The federal case law implicitly recognizes that, as with any affirmative defense, a defendant seeking to avoid conviction by claiming that he was entrapped must first make a preliminary showing that such a verdict in his favor on that issue would not be wholly inconceivable. In Matthews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988), the Supreme Court held that, as with any other affirmative defense, the defendant "is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." 485 U.S. at 62, 108 S.Ct. at 886, 99 L.Ed.2d at 60. See also Simopoulos v. Virginia, 462 U.S. 506, 510; 103 S.Ct. 2532, 2536; 76 L.Ed.2d 755 (1983) ("Placing upon the defendant the burden of going forward with evidence on an affirmative defense is normally permissible.")

The question presented by the statute and the jury instruction under examination here, however, is not what quantum of proof must be shown before a defendant is entitled to have the jury instructed on entrapment. Rather, the statute posits that, in order to be found not guilty by reason of entrapment, the defendant must establish the existence of that defense by the preponderance of the evidence. In Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), the United States Supreme court held that due process was not offended where a state requires the defendant to prove an affirmative defense once the state has established each

of the elements of the offense beyond a reasonable doubt. Thus, in Patterson, the defendant was accused of murder, and the state of New York proved beyond a reasonable doubt that he had committed each of the elements of that crime. Thereupon, there was no constitutional defect in requiring the defendant to prove his proper defense of extreme emotional disturbance by a preponderance of the evidence.

In so holding, the court relied on Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed.2d 1302 (1952), which upheld a procedure whereby the jury first had to find each element of the crime beyond a reasonable doubt, based on all the evidence, including the evidence going to an insanity defense. Only thereafter was the jury to consider separately the legal issue of insanity itself, which the defendant was required to establish. And in Patterson, the Supreme Court was most careful to emphasize that the jury was instructed that if it found beyond a reasonable doubt that the defendant intentionally killed the deceased, but that the defendant had demonstrated by the preponderance of the evidence that he acted under the influence of extreme emotional disturbance, then it had to find the defendant guilty of the lesser included crime of manslaughter.

The United States Supreme Court repeated its emphasis on the completeness of the jury charge with respect to the state's burden of proof as it interrelated to the defense's burden to prove an affirmative defense in its most recent pronouncement on this issue in Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). In Martin, the defendant was charged with murder by causing the death of another "with prior calculation and design."

At trial, she sought to avoid conviction by arguing that she acted in self defense. She was convicted, however, of murder, and on appeal contended that by instructing the jury that she had the burden of proving self defense by a preponderance of the evidence, the state impermissibly shifted the burden of proof from the prosecution to prove every element of its case.

By a five to four vote, the Supreme Court rejected the defendant's position that someone acting in self defense virtually never effects a death "with prior calculation and design" because the circumstances giving rise to the defense generally occur in an extremely short period of time, making forethought largely impossible. Thus, argued the defendant, by being required to prove self defense, she was in effect being required to disprove an element of the state's case, prior calculation. Such a scheme would be in violation of the burden-shifting prohibition expressed in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).[2] See also In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In deciding the case adversely to the defense, the Supreme Court reasoned that Ohio had not impermissibly shifted the burden of proof because the instruction as given to the jury made it clear, as had the instructions in Patterson, that the jury was to

---

[2] In Mullaney, the Supreme Court held that Maine had unconstitutionally shifted the burden to the defendant to prove his innocence of murder where it required him to assume the burden of proving that he acted in the heat of passion on sudden provocation, where the crime of murder was defined as a killing committed suddenly, "without any, or without a considerable provocation." Thus, in order to prove his defense, the defendant would have to negate an element of the offense which the state should properly have been required to prove.

consider all the evidence, including the evidence of self defense, in determining, first, whether the state had proved its case beyond a reasonable doubt. Only thereafter, upon being convinced that the elements of the offense had been satisfactorily established, was the jury to decide whether the defendant had adequately shown that she acted in self defense, so as to excuse her homicide. The court cautioned:

> It would have been quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the state's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of Winship's mandate.

Martin v. Ohio, supra, 480 U.S. at 233-234, 107 S.Ct. at 1102, 94 L.Ed.2d at 274. In Martin, to the contrary, the jury had been instructed:

> that to convict it must find, in light of all the evidence, that each of the elements of the crime of aggravated of murder has been proved by the State beyond reasonable doubt and that the burden of proof with respect to these elements did not shift. To find guilt, the jury had to be convinced that none of the evidence, whether offered by the State or by Martin in connection with her plea of self-defense or by Martin in connection with her plea of self-defense, raised a reasonable doubt that Martin had killed her husband, that she had a specific purpose and intent to cause his death, or that she had done so with prior calculation and design. It was told, however, that it could acquit if it found by a preponderance of the evidence that Martin had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger.

Id. 480 U.S. at 233, 107 S.Ct. at 1101, 94 L.Ed.2d at 274 (emphasis added).

As shown, then, under the United States Constitution the burden of an affirmative defense may be placed on the defense only where the jury instructions still require the state to prove beyond a reasonable doubt all the elements of the crime. The jury is to consider all the evidence in reaching this initial conclusion; only then may the jury consider whether the defendant should nevertheless be acquitted because he has demonstrated his defense by a preponderance of the evidence. Absent such a clarifying instruction, the danger that the jury will misunderstand its task and erroneously conclude that the defendant has the burden of disproving an element of the state's case would violate the defendant's due process rights in contravention of Mullaney v. Wilbur, supra.

As a result of this analysis, it is evident that the United States Constitution gives Florida the right -- although not the obligation[3] -- to determine that a defendant will be required to prove a particular affirmative defense by the preponderance of the evidence. Federal due process requires, however, that the jury instructions relating to the entrapment defense must expressly advise the jury that it is first to consider all the evidence,

---

[3] The United States Supreme Court noted in Martin v. Ohio, supra, 480 U.S. at 236, 107 S.Ct. at 1103, 94 L.Ed.2d 275, that all but two states require the prosecution to prove the absence of self defense when it is properly raised by the defendant. See also Yohn v. State, 476 So.2d 123 (Fla. 1985) (state required to disprove insanity beyond a reasonable doubt once defendant presents evidence rebutting presumption of sanity). Petitioner argues above in subheading A, however, that the Florida Constitution prohibits the burden shift.

including the defense evidence of entrapment, in deciding whether or not the state has proven its case beyond a reasonable doubt.

The instructions given in the instant case were inadequate to meet that requirement. The jury was instructed only in the most general terms with respect to the state's burden of proof (R 1494-1496) (quoted at length in statement of facts in this brief). These instructions made absolutely no mention of the way in which the jury was to consider any evidence of entrapment in assessing whether the state had proven its case. Nor did the instructions on entrapment other than the one at issue here remedy this omission (R 1496-1498) (quoted at length in statement of facts). The instructions made no attempt to interrelate the state's burden of proof to establish the elements of the crime, which may never shift to the defense, and the burden of showing entrapment. They also contained no explicit statement that the jury must consider all the evidence, including specifically any evidence of entrapment which it found, in deciding whether the state had proven its own case beyond a reasonable doubt. Where there is any reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, the conviction must be set aside. Francis v. Franklin, supra, 471 U.S. at 323, n. 8; 105 S.Ct. at 1965; 85 L.Ed.2d 344 (1985).

Consequently, the entrapment instruction given at Petitioner's trial had the improper effect of impermissibly shifting the burden of proof from the state to the defendant, in violation of the due process clause of the United States Constitution as well as the Florida Constitution.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S OBJECTION TO PEREMPTORY CHALLENGES OF BLACK JURORS BY THE PROSECUTOR AND BY A CO-DEFENDANT.[4]

This point on appeal involves the constitutional prohibition on racially motivated exercise of peremptory juror challenges as set forth in State v. Neil, 457 So.2d 481 (Fla. 1984) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Over defense objection, the trial court here allowed both the prosecutor and counsel for co-defendant Janette Dempster to strike black prospective jurors from the panel. Out of a total of four black prospective jurors, the prosecutor struck two, Lolita Hawkins and Jewel Thomas, while the co-defendant struck one, Anthony Canady (R 379, 385, 393, 396-397). Only one black served on the jury, Willie Joe Lewis (R 387, 402). The fact that this one black juror served does not matter; if any other juror has been improperly excused because of race, it does not matter that another juror was not so excluded. Tillman v. State, 522 So.2d 14 (Fla. 1988).

State v. Neil, supra, and its progeny prohibit the state from exercising its peremptory challenges in a racially discriminatory manner. Thus the trial court here erred in allowing the state's two peremptory challenges of blacks. Neil also states, however, that the state as well as the defense may challenge the improper

---

[4] Although this issue was not the subject of the question certified by the District Court, it was raised before the District Court as Petitioner's Point I. Review by this Court encompasses not only the certified question, but the entire decision of the court below. Reed v. State, 470 So.2d 1382 (Fla. 1985).

use of peremptories. 457 So.2d at 487. See also Cure v. State, 564 So.2d 1251 (Fla. 4th DCA 1990). This means that Appellant here had standing to object not only to the state's peremptories, but also to the co-defendant's: since the state had standing to object to the co-defendant's peremptories, so did Appellant. Both sides are entitled to an impartial jury. Id.

However, even if this Court should for some reason decide that Appellant could not challenge his co-defendant's peremptories, the state's improper exercise of its peremptories is sufficient to require a new trial. The same is true even if this Court finds only one of the state's peremptories to have been improper. The number of jurors improperly challenged is not dispositive. State v. Slappy, 522 So.2d 18, 21 (Fla. 1988); Jennings v. State, 545 So.2d 945 (Fla. 1st DCA 1989). Of course, even though Appellant, unlike the challenged jurors, was not black, he still had standing to object to the challenges. Kibler v. State, 546 So.2d 710 (Fla. 1989).

The trial court's allowance of the state's and the co-defendant's challenges to the black jurors was improper because the prosecutor and counsel for the co-defendant failed to provide, when called upon to do so, race-neutral explanations for their challenges. In order to permit questioned racial challenges, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext. State v. Slappy, supra, 522 So.2d at 22. Additionally, there must be record support for the reasons given and for the absence of pretext. Id. at 23. Here, the reasons given for the questioned challenges do not meet these standards.

The prosecutor stated the following reasons for challenging Lolita Hawkins (R 382-383):

> MS. QUEVEDO [Prosecutor]: She is single, she is young, just like Susan Taylor, who I struck. I don't want young jurors. I think they are not going to be mean enough.
>
> She acted completely annoyed, hasn't laughed about anything, just rolls her eyes. She is just annoyed with the whole process.

As reasons for challenging Jewel Thomas, the prosecutor stated the following (R 393):

> MS. QUEVEDO: Division of Youth Services, lives in Riviera Beach. I'd like to get to Jeannie Marie Thomas who is a person I want.

Counsel for co-defendant Janette Dempster stated the following as reasons for challenging Anthony Canady, referring to reasons earlier given by the state but rejected by the court when the state attempted to challenge Canady (R 397):

> MR. GOMBERG [Counsel for co-defendant Dempster]: I share the reasons of the state.
>
> THE COURT: Announce those again.
>
> MR. GOMBERG: I don't think, given his background and his youth, that he is likely to be tolerant of the sorts of behavior that will be testified to in this case and be fair and impartial concerning my client.

The prosecutor's earlier reasons for attempting to challenge Canady, now adopted by the co-defendant, were as follows (R 388):

> MS. QUEVEDO: I didn't ask him enough questions. No one asked him anything which I should have. It is Riviera Beach, bad police relationships there. I don't think -- conservative.

Most of the reasons given for challenging the black prospective jurors were unacceptable because they simply had no support in the record. State v. Slappy, supra, 522 So.2d at 22.

Youth was stated as a reason for challenging both Hawkins and Canady, but it is not shown in the record how old they were or how old were the other panel members who were not challenged. A factor weighing against the legitimacy of a reason for a challenge is that the challenge is based on reasons equally applicable to jurors not challenged, id.; here no such comparison can be made because the state and the co-defendant failed to establish on the record the ages of the jurors challenged and not challenged. The co-defendant's reference to Canady's "background" is similarly without record support because his background was never specified nor was the background of any of the other jurors ever specified for comparison.

Also unsupported by the record are the state's contentions that Hawkins acted annoyed, hadn't laughed, rolled her eyes, and was annoyed. Such contentions regarding juror behavior must be substantiated by the record; otherwise they are baseless. Shelton v. State, 563 So.2d 820 (Fla. 4th DCA 1990). Similarly unsubstantiated was the state's contention in relation to Hawkins that young jurors were not "mean enough" and the co-defendant's contention that Canady, because of his background and youth, was unlikely to be "tolerant." These contentions are additionally unacceptable because they are expressions of mere feelings by the lawyers. Feelings about a juror do not satisfy Neil. Slappy at 23; Batson, 476 U.S. at 106 (Marshall, J., concurring); Foster v. State, 557 So.2d 634 (Fla. 3d DCA 1990); Floyd v. State, 511 So.2d 762 (Fla. 3d DCA 1987).

Also without record support was the state's contention that there were "bad police relationships" in Riviera Beach, where Jewel

Thomas and Anthony Canady lived. The prosecutor also uttered the word "conservative" when discussing Canady, but didn't explain what if anything this meant. Although a "liberal" or "conservative" categorization might be a legitimate reason, it is not legitimate if the state fails, as here, to demonstrate through questioning that the alleged orientation actually existed. Slappy at 24.

Several of the other reasons advanced for the challenges in question do have some basis in the record, but are nonetheless otherwise improper. First, the state noted that Hawkins was single. However, two other panel members were also single but were not challenged by the state (R 95, 102). Second, Jewel Thomas did work for the county Division of Human Services (R 135). However, two panelists who did ultimately serve on the jury also worked in what might be termed social service occupations, if this is what the prosecutor was getting at: one juror was a teacher (R 142) and one was a nursing assistant (R 148). Since the record here shows that the state's objections based on marital status and occupation were equally applicable to jurors who were not challenged, these reasons are shown to be impermissible pretexts. Slappy at 22. Occupation in particular has been held to be an invalid reason without some showing of its relationship to the case at hand. See Mayes v. State, 550 So.2d 496 (Fla. 4th DCA 1989), and Gadson v. State, 561 So.2d 1316 (Fla. 4th DCA 1990). Third, the prosecutor stated that she was striking Jewel Thomas in order to reach another juror who she preferred. Although eliminating one juror in order to reach another may be legitimate, counsel must provide non-racial reasons for challenging black jurors instead of white jurors to

make room. Kibler v. State, supra; Foster v. State, supra. The prosecutor did not provide such reasons.

Above all, the state's failure here to examine any of the black panel members betrays the state's racial motivation. Slappy at 22. The prosecutor asked no questions of Hawkins, Jewel Thomas, Lewis or Canady. Similarly, counsel for the co-defendant asked no questions of Canady, the black panel member who he challenged. Oddly, the prosecutor, whose reasons for challenging Canady were adopted by the co-defendant, gave as a reason for her challenge to Canady the very fact that she herself had not asked Canady enough questions and that no one else had asked him anything "which I should have." It is evident that the lawyers considered race a sufficient reason for a challenge without any questioning.

Because of the improper exercise of peremptory challenges against black jurors, the trial court should have dismissed the jury pool and started voir dire over with a new pool. Neil, 457 So.2d at 487. The court's failure to do so was a denial of due process, a fair trial, equal protection of the law, and the right to a jury drawn from a fair cross section of the community, under the Florida and United States Constitutions. This Court must order a new trial.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the District Court and to remand this cause with proper directions.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

ALLEN J. DeWEESE
Assistant Public Defender
Florida Bar No. 237000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Douglas J. Glaid, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 13th day of August, 1991.

Counsel for Petitioner