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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,877

DAVID F. LUCAS,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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CERTIFIED QUESTION

WHEN A DEFENDANT HAS BEEN CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES FAILURE TO EXPLAIN JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION ALWAYS CONSTITUTE BOTH "FUNDAMENTAL" AND PER SE REVERSIBLE ERROR, WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL AND MAY NOT BE SUBJECTED TO A HARMLESS ERROR ANALYSIS, REGARDLESS OF WHETHER THE EVIDENCE COULD SUPPORT A FINDING OF EITHER JUSTIFIABLE OR EXCUSABLE HOMICIDE?

1. In its initial brief, the State cited twelve cases in which this Court had refused to reverse convictions based on unpreserved errors in jury instructions. Nine of those involved homicides, two involved robberies, and one involved trafficking in cocaine. The defendants in five of the nine homicide cases were convicted of lesser included offenses, and the erroneous jury instructions related either to the offenses of which the defendants were convicted or to the offenses one step removed. In the other four homicide cases, the erroneous jury instructions related to affirmative defenses (insanity defense, excusable homicide) or to aggravating factors for imposing the death penalty. In the other three cases, the erroneous jury instruction related to the charged offenses for which the defendants were convicted (robbery or trafficking in cocaine), or to a necessarily lesser included offense of the charged/convicted offense (robbery).

Out of the above twelve cases, Lucas selected one to discuss in his answer brief--State v. Delva, 575 So. 2d 643 (Fla. 1991).

He distinguishes Delva from his case by stating that different crimes (attempted murder versus drug trafficking) and different types of jury instructions (charged offense versus lesser included offense) were involved.

Lucas' first distinction totally escapes the State. In both cases, the jury instructions were incomplete because essential elements were omitted. The type of crime involved adds nothing of substance to the analysis. All it demonstrates is the nature of the element that was omitted. In Delva, this Court stated, "Because knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element of the crime could not be fundamental error and could only be preserved for appeal by a proper objection." Id., at 645. By contrast, in the instant case, the error was held to be fundamental, even though (1) the defendant was not convicted of the lesser offense on which the jury was improperly instructed; (2) the defendant's defense did not relate to the omitted element; and (3) no evidence was presented that would have supported a conviction on the lesser offense had the jury received an accurate instruction.

Turning to Lucas' second distinction, he contends that fundamental error occurs when the jury is incorrectly instructed on lesser offenses but not on charged offenses. His explanation is that the jury has a right to pardon the defendant, and it cannot exercise that right absent an accurate jury instruction. The State's response is twofold.

First, if the fundamental error doctrine has any application at all to jury instructions, it would have to apply to instructions on charged offenses before it applied to lesser offenses. The State's burden of proof relates to the offense actually charged, and that is why it is important that the jury be properly instructed on all of the elements of the charged offense. Lesser offenses, on the other hand, are not on an equal footing with the charged offense, and it is trial strategy that dictates the giving of instructions on lesser offenses. Lucas has the cart before the horse when he argues that fundamental error occurs in instructions on lesser offenses but not on charged offenses. Delva, as well as Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982), makes it unmistakably clear that errors in jury instructions on charged offenses do not constitute fundamental error, at least where the error relates to an undisputed element. Errors in jury instructions on lesser offenses surely do not deserve a more elevated position in the hierarchy of trial errors.

Second, all juries are instructed that they must follow the law given to them by trial courts, that they must determine whether evidence shows beyond a reasonable doubt that the defendants committed the charged greatest offenses, and that they cannot turn their attentions to the lesser included offenses until they first determine that the evidence does not support convictions for the greater offenses. Jury pardons occur when juries return verdicts contrary to the evidence and the law,

which either totally absolve defendants or partially absolve the defendants by convictions for lesser offenses. These miscarriages of justice are not based on the accuracy of the jury instructions; if they were, they would not be miscarriages of justice; i.e., jury pardons; they would be just verdicts based on the law and the evidence. Instead pardons are based on the willingness of juries to disregard the law and the evidence. Here, the jury was given a smorgasbord of lesser offenses. It chose to follow the law and the evidence by convicting Lucas of the highest charged offenses which the evidence supported and, thus, never considered the lesser offenses which were mooted by the verdict on the higher offense.[1]

2. Lucas asserts that the State's reliance on Banda v. State, 536 So. 2d 221 (Fla. 1988) is misplaced because the defendant in Banda was convicted of a crime two steps removed from the crime of manslaughter. The State cited Banda solely because this Court had cited it in Rojas v. State, 552 So. 2d 914 (Fla. 1989). The State pointed out that Banda did not support the result reached in Rojas, because in Banda, the error was held not to be fundamental. (P.B. 19, fn 4) That being said, Lucas,

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[1] We should not create a judicial support system for the proliferation of miscarriages of justice. The State recognizes the de facto power of a jury to simply refuse to follow the law and the evidence and to either convict the innocent or absolve the guilty. Nevertheless, no rational or just system of law sets out to increase the power of juries to disregard the law and the evidence by giving them instructions to facilitate their doing so. See State v. Wimberly, 498 So. 2d 929, 932-935 (Fla. 1986) (J. Shaw's dissent).

nevertheless, has misread Banda, which the following analysis will illustrate. In its first Banda decision, this Court stated:

> [Banda] contends that the trial court's failure during the guilt phase to give a complete instruction on all lesser included offenses of homicide denied him his due process rights. The record before us discloses that, without objection from the defense, the trial court instructed the jury on the crimes of first-degree murder, second-degree murder and manslaughter, but did not so instruct on excusable and justifiable homicide. Because manslaughter is a residual offense, an instruction on that crime must include a definition of justifiable and excusable homicide. Hedges v. State, 172 So. 2d 824 (Fla. 1965). However, the present case essentially is indistinguishable from Squires v. State, 450 So. 2d 208 (Fla.), cert. denied, 469 U.S. 892 (1984). There, we held that where the defendant is found guilty of first-degree murder, an error or omission in an instruction on the lesser included offense of manslaughter is not fundamental error. Even if an objection had been made, appellant would not prevail because he was convicted of an offense greater than the least of the offenses correctly instructed. State v. Abreau, 363 So. 2d 1063 (Fla. 1978). In light of the record in this case, we also reject appellant's argument that the jury was not adequately informed as to what constitutes an unlawful killing.

13 Fla. L. Weekly 451 (Fla. July 14, 1988).

On rehearing, this Court substituted the following opinion:

> [Banda] contends that the trial court's failure during the guilt phase to give a complete instruction on homicide denied him his due process rights. The record before us discloses that with the concurrence of defense counsel, the trial court instructed the jury on the crimes of first-degree murder, second-degree murder and manslaughter, but did not so instruct on excusable and justifiable homicide. Banda argues that because murder constitutes the

> unlawful killing of a human being, the court's failure to explain that excusable and justifiable homicide were lawful killings rendered the instruction fundamentally defective. While the court should have given at least a minimal definition of excusable and justifiable homicide, Banda was not prejudiced because there was no evidence which would have supported either defense. Cf. Squires v. State, 450 So. 2d 208 (Fla.), cert. denied, 469 U.S. 892, 105 S. Ct. 268, 83 L. Ed. 2d 204 (1984), in which a stipulated instruction referring to excusable and justifiable homicide by name but failing to define them was deemed not to be fundamental error.

536 So. 2d at 223.

In footnote 1 in Rojas, this Court reaffirmed its previous holdings that an erroneous instruction two steps removed from the crime of which the defendant was convicted constituted harmless error. No distinction was made between preserved and unpreserved errors. It cited a preserved-error case, Abreau, and an unpreserved error case, Banda. This Court then explained the difference between the two Banda decisions:

> This portion of our opinion in Banda [referring to two-step test] was later withdrawn only because, upon motion for rehearing, the appellant explained that he was not arguing that the judge had erred in failing to give a complete instruction on all the lesser included offenses of homicide.

552 So. 2d at 916, fn 1.

While the State did not expressly rely on Banda in its initial brief, on further reflection, it should have. Banda stands for the proposition that failure to give a jury instruction on lawful homicide is not fundamental error when no

evidence was presented to support such a defense. In the instant case, no evidence was presented to support a jury instruction on manslaughter or on lawful homicide. How could a defective jury instruction on which no evidence was presented ever be deemed fundamental error? Banda unequivocally holds that it cannot.

3. Although Lucas asserts that Rojas v. State, supra, was correctly decided, he does not address the State's argument that the result reached in Rojas was not supported by supreme court precedent.

4. Lucas contends that the State's real argument is "... the unsubstantiated specter of potential post-conviction relief proceedings in other cases." (R.B. 4) Except for this comment, Lucas makes no effort to refute the State's argument. No conscientious court can afford to ignore the effect of its decisions on collateral litigation.

5. Lucas asserts that the certified question is too broad. The State does not fully understand why. The certified question has in mind a defective jury instruction on the lesser offense of manslaughter when the defendant has been convicted of that offense or of an offense one step removed (second or third degree murder) Lucas apparently thinks an erroneous jury instruction on a lesser offense that was rejected by the jury is somehow more significant than an erroneous instruction on the lesser offense actually chosen by the jury. The State does not consider either to be fundamental error, but if a distinction must be drawn, the offense of conviction is surely more important.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to quash the decision of the First District Court of Appeal and affirm Lucas' judgment and sentence for attempted second-degree murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to Lynn Williams, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301 this 31st day of March, 1994.

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