IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 83,502

JOHN EDWARD HOUCK, JR.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT AND THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

SUMMARY OF ARGUMENT

Asphalt pavement qualifies as an "object" under the current jury instructions defining "weapon." The best evidence of a weapon's character is what it is capable of doing or the injury it actually inflicts. There is no question that the pavement was used as a weapon under the facts of this case. Imaginative hypothetical situations can be instructive but have no application to the particular events in this cause. Reasonable persons can differ as to whether Appellee "used" a "weapon" herein. The issue is therefore one for the jury to decide.

Appellee was not entitled to an instruction on a permissive lesser included offense not supported by the evidence. This issue was not preserved with either an objection or a request which stated the legal grounds upon which the demand was made. The district court's decision on this secondary issue should not be disturbed.

POINT I

IN REPLY: WHETHER A "WEAPON" WAS "USED" UNDER THE FACTS OF THIS CASE IS A QUESTION TO BE DETERMINED BY THE JURY.

Appellee misconstrues the State's argument as urging adoption of a "broad construction" of the word "weapon." The jury instructions define weapon as any "object." The State argues that asphalt pavement qualifies as an object. In reality, only one piece of the pavement no larger than a square foot was used to inflict the deadly blows in this case. However, because that piece was attached to a larger piece of asphalt, Appellee believes that it cannot be a weapon. This is an incorrect assumption. Courts have long held that the best evidence of a weapon's dangerous character, and of what it is capable of doing, is the injury actually inflicted by it. Hopkins v. State, 4 App. D.C. (1894). A dangerous weapon need not be a hand-held item. Tatum v. U.S., 110 F.2d 555 (D.C. 1940).

The question is not just the generic definition of a weapon. Rather, it is the "use" of the object which defines the scope of the term. There are numerous esoteric hypotheticals which can be postulated on this question. Factually, however, it is clear that if a person kills someone by repeatedly beating the victim's head against a hard surface, he is using the pavement as a weapon. Appellee had simultaneous contact with both the victim and the weapon. There is no question that he used the pavement to kill the victim. Where a perpetrator has control over the victim or an object and repeatedly causes the victim to impact upon the object or weapon thereby causing the death of the victim, a weapon was used to cause the death.

Whether in some other imaginative instance the same conclusion would be appropriate is not germane to the question at bar. Appellee's concern over a "strained construction" of the statute is unfounded. The "enhancement" law has been in effect for twenty years, and Appellee admits this is a case of first impression. Obviously, the situation in the present case does not arise too often. Appellee's argument will effectively abolish the statute. Appellee states that only the legislature can define the term weapon. He further argues that neither the jury nor the judiciary can determine its meaning. This argument borders on the preposterous. Nearly two centuries ago, a great chief justice wrote:

> [i]t is emphatically the province and duty of the judicial department to say what the law is. Those who must apply the [law] to particular cases, must of necessity expound and interpret that [law]. Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L.Ed.2d 60 (1803).

Appellee relies upon the District Court's use of "ejusdem generis" to properly construe the definition of weapon. The State submits that the District Court applied that doctrine only to Chapter 790, Fla. Stat. which is not pertinent to the statute under construction. The preamble to §790.001, Fla. Stat., triply limits definitions solely to that chapter:

> The following words and phrases, **when used in this chapter**, shall, **for the purposes of this chapter**, have the meanings respectively ascribed to them **in this chapter**...

In this case, the jury instructions were the law and the definition of weapon was

clearly set out therein. Both the District Court and Appellee ignore the impact of the present ruling vis-a-vis the jury instructions. If the jury instructions are correct in the definition of a weapon, how can the majority be correct in its conclusion? The State emphatically argues that the trial court judgment and sentence must be affirmed.

POINT II

IN REPLY: IT WAS NOT REVERSIBLE ERROR TO DENY A JURY INSTRUCTION ON A PERMITTED LESSER INCLUDED OFFENSE.

The State prefaces its response to this point raised in Appellee's answer brief with the same contention made below and tacitly approved by the district court -- this matter is not preserved for review. The Defendant below did request the permissive lesser included offense of aggravated battery without stating legal grounds or basis therefor. (T 402) However, no objection was made to the instructions as given. (T 534) This issue involves a permissive lesser included offense for which no argument was made by the defense. There is no indication that the Defendant disagreed with the final version of the instructions and there was no attempt to inform the trial court of perceived error.

It is well established that a permissive lesser included offense can only be given if counsel stipulate or the evidence and the charging document support it. Baker v. State, 578 So. 2d 37 (Fla. 4th DCA 1991). Appellant cites two cases standing for the proposition that where there is an issue of fact as to who actually caused the fatal injury, aggravated battery may be a lesser included offense under the homicide statute.

The State argues that the record clearly shows no factual dispute regarding who committed this crime. While there are discrepancies between the testimony of the various eyewitnesses, there was no credible evidence inconsistent with Defendant's guilt. There was no testimony that anyone except the Defendant kneeled

over the victim; and the victim's injuries correspond to the eyewitness testimony. (T 507) Therefore, Martin v. State, 342 So. 2d 501 (Fla. 1977) is controlling. Jury instructions in a homicide case are restricted to the degrees of murder, manslaughter, and justifiable and excusable homicide. The district court's ruling on this secondary issue should not be disturbed.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays that this Honorable Court accept jurisdiction and reverse the decision of the district court, affirming the judgment and sentence of the trial court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing reply brief on the merits in case number 83,502 has been furnished by U.S. Mail to David A. Henson, Esq., 1150 Louisiana Avenue, Suite 1, P.O. Box 2728, Winter Park, FL 32709 and to Irby Pugh, Esq., 218 Annie Street, Orlando, FL 32806, this 20th day of June, 1994.

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