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app

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,766

THE STATE OF FLORIDA,

**FILED**

Petitioner,

SID J. WHITE

JUN 27 1994

-vs-

CLERK, SUPREME COURT

By

Chief Deputy Clerk

COLLIN GRAY,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

The defendant, Collin Gray, was charged by information, along with two codefendants, Trevor Miller and Andrew Jackson, with one count of attempted first degree murder, and two counts of armed robbery. (R. 9). The amended information, which was filed shortly prior to the commencement of voir dire, had added the phrase "with a firearm," to the robbery alleged in count three, as that phrase had been inadvertently omitted from the original charging document. (R. 11; T. 133-34). One of the armed robbery counts was nolle prossed due to the inability of the State to locate the victim. (T. 32, 230).

At trial, Albert Lee testified about the involvement of the defendant, Collin Gray, and his two codefendants, in the armed robbery which occurred on April 9, 1992, around 2:00 p.m., at the Pepper Pot restaurant, which Lee owns. (T. 230-74). During the course of this robbery, the defendant, who was identified by Mr. Lee, was pointing a handgun at Mr. Lee. (T. 235-37, 267-68). The defendant took a wallet and cash from Mr. Lee's pockets, and took additional cash from a drawer under the cash register, after forcing an employee to open it. (T. 269-72). The defendant stole approximately \$2,500 to \$3,000 in cash from Mr. Lee, and then proceeded to go to the grocery section of the restaurant, where he robbed another man of approximately \$7,000 in Jamaican currency. (T. 272-73).

The entire robbery lasted about five minutes, and after the defendant and his companions fled, Mr. Lee immediately called the police. (T. 274). At approximately 1:55 p.m., on that same date, Officer Richard Shadwick, who was on patrol, received a BOLO regarding an armed robbery which had occurred in the area which he was patrolling. (T. 300-303). While he was listening to the BOLO, he observed a car matching the description, and began to pursue it. (T. 305-307). The car was a gray Toyota with a temporary tag, and the officer observed three occupants in the car. (T. 305-306). Shadwick, using his police radio, informed other officers that he had identified armed robbery suspects and that he was following them. (T. 307). Soon thereafter, a marked Metro-Dade police car joined the chase. (T. 307).

Shadwick had initially observed the vehicle at 119th Street and N.W. 12th Avenue. (T. 303). When the marked Metro-Dade police car joined the pursuit, the pursued Toyota was driving westbound on 125th Street. (T. 307). When the marked police car turned on its emergency equipment, the Toyota turned north on I-95 and began driving very fast. (T. 308). After recklessly weaving in and out of traffic for approximately a half mile, the Toyota exited I-95 at 135th Street. (T. 308-309). The Toyota then ran through a red light at the intersection of 135th Street and 6th Avenue and violently struck another car in the intersection. (T. 309).

The driver of the vehicle which the Toyota struck, identified as Jerome Passmore, was ejected from his vehicle during the collision. (T. 309, 316-17). One of the codefendants, Jackson, was observed exiting the Toyota from the driver's side. (T. 310). The defendant, Collin Gray, was subsequently found in the front passenger seat of the Toyota. (T. 312). The other codefendant, Miller, was ejected from the Toyota during the collision. (T. 312-13).

During the course of the ensuing investigation, the police recovered a stack of Jamaican currency and Mr. Lee's wallet, from defendant Gray's pants. (T. 332, 345-49). Detective Pellechio, one of the investigators, related the confession which codefendant Jackson gave. (T. 357-58). Jackson admitted that all three defendants participated in the offense, that all three were armed, and that all three fled in the gray Toyota after the robbery. (T. 358-59).

The physician who treated Mr. Passmore, the victim of the collision caused by the Toyota, was rendered a quadriplegic, as a result of the collision, due to a traumatic injury to the cervical spine. (T. 382).

The defendant, Collin Gray, was found guilty of attempted first degree murder and armed robber, was adjudicated guilty as

to those counts, and was sentenced to 22 years in state prison, with a three year minimum mandatory sentence. (R. 76-77, 80-84; T. 556-58, 560, 587).

On appeal, the Third District Court of Appeal affirmed the robbery conviction and reversed the attempted first degree murder conviction, and remanded for resentencing. (R. 94). Although the appellate court acknowledged that the crime of attempted felony murder is recognized by this Court, the Third District accepted the defendant's argument "that there was insufficient evidence to present a jury question concerning whether the acts committed against the victim could have caused his death." (R. 96). The lower court reached this conclusion because "[t]he running of the red light and the resulting collision do not constitute overt acts reasonably understood to result in a person's death." The lower court found that such acts did not satisfy the "overt act" requirement, as defined by this Court in Amlotte v. State, 456 So. 2d 448 (Fla. 1984). (R. 95-96).

The District Court of Appeal certified, to this Court, that the Third District's decision involved the following question of great public importance:

WHETHER THE "OVERT ACT" REFERRED TO IN  
AMLOTTE V. STATE, 456 So. 2d 448, 449 (Fla.  
1984), INCLUDES ONE, SUCH AS FLEEING, WHICH  
IS INTENTIONALLY COMMITTED BUT IS NOT  
INTENDED TO KILL OR INJURE ANOTHER?

(R. 97).

QUESTION PRESENTED

WHETHER THE "OVERT ACT" REFERRED TO IN  
AMLOTTE V. STATE, 456 So. 2d 448, 449 (Fla.  
1984), INCLUDES ONE, SUCH AS FLEEING, WHICH  
IS INTENTIONALLY COMMITTED BUT IS NOT  
INTENDED TO KILL OR INJURE ANOTHER.



### SUMMARY OF THE ARGUMENT

The Third District Court of Appeal, through its decision and certified question, suggests that the overt act required for attempted felony murder must be one which is both intentionally committed and intended to kill or injure another. In reaching such a conclusion, the lower court applied an erroneous legal standard and misconstrued this Court's decision in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), as Amlotte simply requires that the overt act be an intentional one which could, but does not cause the death of another; it need not be intended to cause the death or injury of another.

Not only did the lower court apply an erroneous legal principle, but, in applying the law to the facts of the case, it reached an erroneous conclusion. The actions of the fleeing defendant, and his co-felons, in running a red light at an urban intersection, and thereby causing a collision which rendered the victim quadriplegic, were clearly actions which could, but did not, cause the death of another. The acts of fleeing and running the red light were also intentional acts. Thus, under the principles of Amlotte, the requisite overt act exists for the offense of attempted felony murder.

## ARGUMENT

THE LOWER COURT ERRED IN CONCLUDING THAT AN ACT WHICH IS NOT INTENDED TO KILL OR INJURE ANOTHER CANNOT CONSTITUTE THE OVERT ACT REQUIRED TO PROVE ATTEMPTED FELONY MURDER.

The elements of the offense of attempted felony murder were defined by this Court in Amlotte v. State, 456 So. 2d 448, 449-50 (Fla. 1984):

We find that whenever an individual perpetrates or attempts to perpetrate an enumerated felony, and during the commission of the felony the individual commits, aids, or abets a specific overt act which could, but does not, cause the death of another, that individual will have committed the crime of attempted felony murder. Because the attempt occurs during the commission of a felony, the law, as under the felony murder doctrine, presumes the existence of the specific intent required to prove attempt.

Thus, while the overt act needs to be intentional, it need only be one "which could, but does not, cause the death of another." There is no requirement that the overt act be one which is both intentional and which is intended to kill or injure another.

For this reason, the lower court's certified question, and the reasoning behind its decision, is fundamentally flawed. The certified question asks whether an intentional act, such as fleeing, which is intentionally committed, but is not intended to kill or injure another, is a sufficient overt act under Amlotte. As seen above, the overt act need only be intentional; it need not be one which was intended to kill or injure.

Just as the felony murder doctrine engages in a presumption that the specific intent required for the murder exists by virtue of the commission of the underlying felony, so too, in the case of attempted felony murder, this Court has acknowledged that the specific intent required to prove an attempt is presumed by virtue of the commission of the felony. 456 So. 2d at 450. Therefore, just as felony murder can be predicated upon intentional acts which are not intended to kill or injure, so too, attempted felony murder can be predicated upon intentional acts which are not intended to kill or injure. Once attempted felony murder is recognized as an offense, there is no reason to require that the overt act be both intentional and intended to kill or injure. An individual can engage in intentional acts during the course of a felony, which the individual knows can result in the death or serious injury of others, even if those intentional acts are not intended to kill. Those are precisely the types of actions for which the felon should be culpable. Reckless driving can pose as much of a danger to physical well being as a gun shot. Setting fire to a building, for the purpose of defrauding an insurance company, poses every bit as much of a threat to occupants of the building as an act of violence directed specifically towards the occupants.

As this Court's holding in Amlotte requires only that the overt act be one "which could, but does not cause the death of

another," the only legitimate question in the instant case is whether the acts of flight from robbery and the running of the red light, which caused the ensuing violent collision, are acts which could, but did not, cause the death of the victim. The act of running a red light, at an urban intersection, near a major interstate highway, in the vicinity of other traffic, is clearly an act which is capable of causing the death of another.<sup>1</sup> The lower court erred in concluding that "[t]he running of the red light and the resulting collision do not constitute overt acts reasonably understood to result in a person's death." (R. 96). Deaths resulting from various forms of reckless driving, including the running of red lights at urban traffic intersections, are an all too common occurrence for an appellate court to seriously maintain that such acts are not of the sort which are capable of causing death. Local sections of newspapers, hospital emergency rooms, and daily police reports, are all a sad testimonial to the fatal potential of an intentional decision to run a red light at a traffic intersection. Indeed, the recklessness of this flight from the police did come very close to killing the victim and left the victim in a quadriplegic state.

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<sup>1</sup> Acts committed during flight from the commission of a felony are within the scope of the felony murder rule. Parker v. State, 19 Fla. L. Weekly S322, S323 (Fla. June 16, 1994).

It must be emphasized that the acts of flight and running a red light are intentional acts; they are not acts of mere negligence. This point was duly noted in the recent decision of this Court in State v. Smith, 19 Fla. L. Weekly S305 (Fla. June 9, 1994). There, this Court observed that the acts of choosing to drive a vehicle under the influence, or driving without a suspended or revoked license were intentional, willful acts. So, too, the acts of flight and running a red light are intentional, willful acts. Moreover, even though the defendant, Collin Gray, was not the driver of the vehicle, as a co-felon in the underlying felony, he is guilty of all crimes committed in furtherance of the common criminal scheme in which he participated. Jacobs v. State, 396 So. 2d 713, 716 (Fla. 1981).

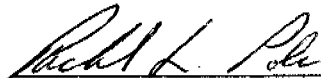
In view of the foregoing, it must be concluded that the lower court, through its apparent belief that the overt act must be one which is intended to kill or injure, applied an erroneous interpretation of Amlotte to the instant case, and secondly, that the lower court further erred in concluding that the acts involved in the instant case were not acts which were capable of causing the death of another.

CONCLUSION

Based on the foregoing, the decision of the lower court, with respect to the conviction for attempted first degree murder, should be quashed, and the lower court should be directed to reinstate the conviction and sentence for that offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to J. RAFAEL RODRIGUEZ, Esq., 6367 Bird Road, Miami, Florida 33155 on this 24th day of June, 1994.



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RICHARD L. POLIN  
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