IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 83,766

THE STATE OF FLORIDA,

Petitioner,

vs.

COLLIN GRAY,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONSE BRIEF OF RESPONDENT ON THE MERITS

J. RAFAEL RODRIGUEZ
Specially Appointed Public
Defender for Collin Gray
LAW OFFICES OF
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TABLE OF CONTENTS

TABLE OF CITATION OF AUTHORITIES

INTRODUCTION

Respondent was the Defendant in the trial court and Petitioner, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, and "T" will designate the trial and transcripts in this case.

STATEMENT OF THE CASE

Defendant, Collin Gray, was charged by Information with one count of Attempted First Degree Murder, in violation of Sections 777.04 and 782.04(1), Florida Statutes, and two counts of Armed Robbery, in violation of Sections 812.013(2)(a)(b) and 777.011, Florida Statutes. (R. 9-12). In particular, it was alleged that on April 9, 1992, Defendant Gray and co-defendants Trevor Miller and Andrew Jackson robbed Earl Whyley and Albert Lee and/or Albert Chang at gunpoint, and attempted to kill Jerome Passmore by colliding with Passmore's car after committing armed robbery. After a jury trial, Defendant was convicted of one count of attempted first degree murder and one count of armed robbery.

On appeal, the Third District Court of Appeal reversed Defendant's conviction for attempted first degree murder. In particular, the appellate court found that the running of the red light and the resulting collision did not constitute overt acts reasonably understood to result in a person's death. (Appendix A-3). The Court noted that insufficient proof had been presented concerning whether the acts committed against the victim could have

cause his death. Id. Due to the requirement in Amlotte v. State, 456 So.2d 448 (Fla. 1984), that an overt act must be alleged and proven, the appellate court reversed Defendant's conviction and certified the following question to this Court:

> "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 INJURY ANOTHER?" (Appendix A-4).

STATEMENT OF THE FACTS

At trial, Officer Richard Shadwick, Metro-Dade Police Department, testified that on April 9, 1992, he was working with Special Agent Bill Lee of the Florida Department of Law Enforcement in an unmarked vehicle when they received a police bulletin (BOLO) in reference to a robbery. Shadwick noticed that a certain vehicle matched the BOLO description, at which point Shadwick and Lee began to follow the car. Three individuals were in the vehicle, a gray Toyota, which headed eastbound on 119th Street. Thereafter, the Toyota turned onto Northwest Fifth Avenue. A marked Metro-Dade police vehicle joined the chase and engaged its emergency equipment. At that point, Shadwick testified that the Toyota turned northbound onto I-95, weaving in and out of traffic. Eventually, the Toyota exited the interstate at 135th Street and proceeded through the red light at the intersection of 135th Street and Northwest 6th Avenue. The Toyota collided with another vehicle in the intersection. (T. 276-286).

Shadwick testified that when he arrived on the scene of the accident he noticed that one of the individuals in the Toyota, co-defendant Jackson, got out of the vehicle. Another individual, Defendant Gray, was being attended to inside the Toyota. The third individual, co-defendant Miller, had been ejected from the vehicle upon impact with the other car and was lying on the ground. Jerome Passmore, the person driving the vehicle that was struck, was being cared for by Fire Rescue. (T. 287-294).

Detective Kenneth Kiple, Metro-Dade Police Department, testified that on April 9, 1992, he became involved in a chase of a vehicle identified by BOLO dispatch on a robbery. Kiple stated that he followed the suspect vehicle and witnessed the accident at the intersection of 135th Street. Kiple saw one of the men in the car flee from the driver's side. The man, co-defendant Jackson, fled through the backyards of several residences. The police set up a perimeter. Eventually, Jackson was apprehended. Kiple impounded a Star pistol found in the front right seat of the Toyota. The firearm was fully loaded. (T. 370-374).

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 ARGUMENT

The appellate court did not err in concluding that insufficient proof had been presented concerning whether the acts committed against the victim could have cause his death. The prosecution did not allege nor prove that Defendant had an intent to commit an overt act which could, but did not, cause the death of the victim. Count I did not refer to any overt act whatsoever. There was no allegation or proof that Defendant intended to commit any act as to Mr. Passmore.

ARGUMENT

(Restated)

THE APPELLATE COURT DID NOT ERR IN CONCLUDING THAT INSUFFICIENT PROOF HAD BEEN PRESENTED CONCERNING WHETHER THE ACTS COMMITTED AGAINST THE VICTIM COULD HAVE CAUSE HIS DEATH

The appellate court did not err in concluding that insufficient proof had been presented concerning whether the acts committed against the victim could have cause his death.[1] The

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[1] The appellate court stated as follows:

"Here, defendant does not dispute that he perpetrated an enumerated felony -- robbery.

court properly determined that in Amlotte v. State, 456 So.2d 448 (Fla. 1984), this Court required allegation and proof of an overt act for purposes of establishing attempted first degree felony murder.

Petitioner contends in its Brief on the Merits that Amlotte simply requires that the overt act be an intentional one which could, but does not cause the death of another; and that it not need be intended to cause the death or injury of another. Petitioner asserts that the acts of fleeing and running the red light were intentional acts to satisfy the requirements of Amlotte. (Petitioner's Brief, p. 6). Petitioner explains that 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. (Petitioner's Brief, p.8).[2]

In Amlotte, this Court recognized that the offense of attempted first degree murder requires a premeditated design to

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> However, he correctly contends that the information does not allege and the state did not present proof of a separate overt act which could, but did not, cause another's death." (Appendix A-3).

[2] The State charged the defendants with attempting to kill Jerome Passmore. Count I does not refer to any overt act whatsoever. Defendant was not properly apprised of the charge of attempted first degree murder in the Information, as required by Rule 3.140(d)(1), Florida Rules of Criminal Procedure. The State did not allege the overt act upon which it based its charge of attempted felony murder. Notably, Petitioner does not address whatsoever Respondent's argument, and the appellate court's finding, that the prosecution did not even **allege** by information a separate overt act which could, but did not, cause another's death.

effect death, but that where the alleged attempt occurs during the commission of a felony the law presumes the existence of premeditation, just as it does under the felony murder rule. Id., at 449 (citing Fleming v. State, 374 So.2d 954, 956 (Fla. 1979)). The essential elements of the crime of attempted felony murder are the perpetration of or the attempt to perpetrate an enumerated felony, together with an intentional overt act, or the aiding and abetting of such an act, which could, but does not, cause the death of another. Amlotte, supra, at 449.

In the present case, the State did not allege nor prove that Defendant had an intent to commit an overt act which could, but did not, cause the death of the victim named in Count I of the Information, alleging attempted first degree murder. The State did not charge nor prove that the defendants had a intent to commit a specific overt act which could but did not cause the death of another. Rather, as noted below, the information alleged that defendant's car collided with the victim's car and the state presented evidence that during the high-speed police chase defendant's car proceeded through a red light and struck the victim's car. (Appendix A-3). The appellate court properly concluded that the running of the red light and the resulting collision did not constitute overt acts reasonably understood to result in a person's death. Id.

The running of the red light and the resulting collision do not constitute overt acts reasonably understood to result in a person's death. It is conceivable, as pointed out below, that a

mere "fender-bender" with no injury at all to Mr. Passmore, could give rise to a charge of attempted felony murder.[3] Petitioner contends that reckless driving or arson[4] pose as much danger as a shooting. (Petitioner's Brief, p. 8). However, running a red light[5] is not the type of overt act which can be reasonably understood to result in a person's death. At the very minimum, as noted previously, the prosecution should have at least alleged the overt act of running a red light in the information.

In view of the foregoing, Respondent requests this Honorable Court to affirm the appellate court's reversal of Defendant's conviction for attempted first degree murder.

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[3] As such, accepting Petitioner's interpretation of Amlotte, a individual is not adequately apprised of the possibility of criminal sanction.

[4] Crimes under Florida law. See Sections 316.192 and 806.01, Florida Statutes.

[5] An infraction under Florida law. See Sections 316.074, 316.075 and 316.655, Florida Statutes.

CONCLUSION

For the foregoing reasons, Collin Gray respectfully requests that this Honorable Court affirm the decision of the appellate court.

Respectfully submitted,

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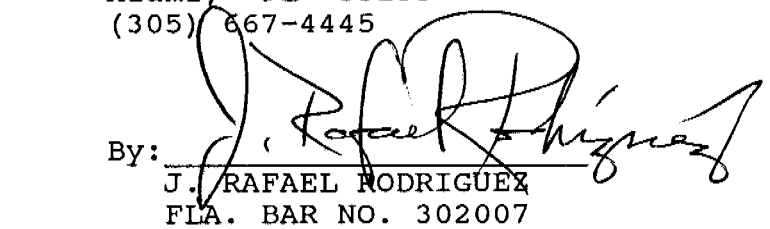
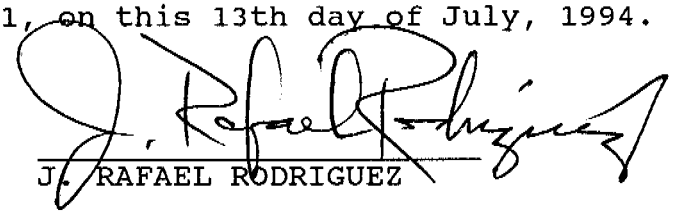


By: _____
J. RAFAEL RODRIGUEZ
FLA. BAR NO. 302007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard L. Polin, Esq., Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida, 33128, Suite N-921, Post Office Box 013241, on this 13th day of July, 1994.



J. RAFAEL RODRIGUEZ

EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1994

COLLIN GRAY, **

Appellant, **

vs. ** CASE NO. 93-763

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed May 10, 1994.

An Appeal from the Circuit Court for Dade County, Arthur Maginnis, Judge.

Bennett H. Brummer, Public Defender, and Rafael Rodriguez, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Richard L. Polin, Assistant Attorney General, and Keith S. Kromash, Certified Legal Intern, for appellee.

Before SCHWARTZ, C.J., and BASKIN and LEVY, JJ.

PER CURIAM.

Collin Gray appeals judgments of conviction for attempted first degree felony murder and armed robbery. We affirm the robbery conviction, reverse the attempted first degree murder conviction, and remand for resentencing.

Gray and two codefendants participated in the robbery of a store clerk. Defendants fled the scene in a vehicle. During the ensuing high-speed police chase, defendant's vehicle proceeded through a red light and collided with another vehicle resulting in serious injury to the passenger. Defendant was charged with armed robbery and attempted first degree murder of the passenger. The information charged that "COLLIN GRAY . . . did unlawfully and feloniously attempt to commit a felony, to wit: MURDER IN THE FIRST DEGREE, upon JEROME PASSMORE, and in furtherance thereof, the defendant[] COLLIN GRAY, . . . while being engaged in the perpetration of, or in an attempt to perpetrate: ROBBERY, attempt to kill JEROME PASSMORE, a human being and in such attempt did Collide with the car of JEROME PASSMORE after committing an ARMED ROBBERY, in violation of s. 782.04(1) and s. 777.04, Fla. Stats. . . . ." The jury found defendant guilty as charged. On appeal, defendant raises several issues; however, only his contention that the trial court erred in denying his motion for judgment of acquittal of the attempted felony murder merits discussion and reversal.

In Amlotte v. State, 456 So. 2d 448, 449 (Fla. 1984), the supreme court recognized the existence of the crime of attempted felony murder and set forth its elements stating that "[t]he essential elements of the crime are the perpetration of or the attempt to perpetrate an enumerated felony, together with an intentional overt act, or the aiding or abetting of such an act, which could, but does not cause the death of another." See Fleming v. State, 374 So. 2d 954 (Fla. 1979). Recognizing that

attempt is a specific intent crime, the court held that the specific intent to kill is presumed if defendant commits, or aids or abets the commission of a specific overt, but ineffectual, act during the perpetration or attempt to perpetrate an enumerated felony. Amlotte, 456 So. 2d at 449-450. "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." Amlotte, 456 So. 2d at 450.

Here, defendant does not dispute that he perpetrated an enumerated felony -- robbery. However, he correctly contends that the information does not allege and the state did not present proof of a separate overt act which could, but did not, cause another's death.[1] The information alleged that defendant's car collided with the victim's car and the state presented evidence that during the high-speed police chase defendant's car proceeded through a red light and struck the victim's car. The running of the red light and the resulting collision do not constitute overt acts reasonably understood to result in a person's death. Thus, we conclude that there was insufficient evidence to present a jury question concerning whether the acts committed against the victim could have caused his death. Cf. Fleming, 374 So. 2d at 956("[w]here the alleged 'attempt' occurs

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[1] "The act in an attempt is known as an 'overt act' and an information must allege facts showing an overt act. . . . 'Overt' means open, apparent and an 'overt act' denotes some outward manifest pursuance of a design or intent to commit a particular crime. . . . The overt act must reach far enough toward acomplishing the desired result to amount to commencement of the consummation of the crime." Morehead v. State, 556 So. 2d 523, 524-525 (Fla. 1st DCA 1990)(citations omitted).

during the commission of a felony . . . the law presumes the existence of premeditation just as it does under the felony murder rule[: b]ecause the appellant was engaged in the commission of a felony when [defendant struggled for possession of the gun and the victim] was shot, the accidental nature of the shooting is irrelevant."); Oropesa v. State, 555 So. 2d 389 (Fla. 3d DCA 1989)(where defendant participated as aider and abettor and codefendant put car in reverse and struck victim evidence sufficient to warrant attempted felony murder conviction), review denied, 562 So. 2d 346 (Fla. 1990). Accordingly, the absence of proof to support the attempted first degree felony murder conviction mandates reversal.[2]

We certify to the supreme court that this decision involves 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?

Affirmed in part; reversed in part; remanded for resentencing; and question certified.

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[2] We are cognizant that had the victim died there would be sufficient proof that defendant committed the offense of first degree felony murder. State v. Hacker, 510 So. 2d 304 (Fla. 4th DCA 1986); see Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1990). However, Amlotte's requirement of an overt act creates an anomoly in the law which precludes defendant's conviction.