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AUG 9 1994

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,766

THE STATE OF FLORIDA,

Petitioner,

-vs-

COLLIN GRAY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Appellant relies on the Statement of the Case and Facts set forth in the Initial Brief of Petitioner on the Merits.

POINT ON APPEAL

WHETHER 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.

SUMMARY OF THE ARGUMENT

Contrary to the conclusion of the lower court, the offense of attempted felony murder does not require proof of an overt act which is intended to cause the death or injury of another. Sufficient evidence of the offense is adduced by proof of an intentional overt act which could, but does not, cause the death of another. The overt act need be an intentional one, but it need not be one intended to kill or injure.

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 primary assertions of the Respondent are that (1) the offense of attempted felony murder requires an overt act which is intended to kill or injure another; and (2) the acts of flight and running a red light are not overt acts "reasonably understood to result in a person's death."

With respect to the first contention, Amlotte v. State, 456 So. 2d 448, 449 (Fla. 1984), refers to "an intentional overt act . . . which could, but does not, cause the death of another." Thus, while the overt act need be intentional, it requires just a general intent to commit the overt act; there is not separate requirement that the overt act be one which is intended to kill or injure another. For that very reason, this Court, in Amlotte, further stated:

. . . 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.

456 So. 2d at 450. Since the specific intent required to prove attempt is presumed by proof of the commission of the felony,

the only additional requirement is proof of an intentional overt act.

Thus, the only question presented in the instant case is whether the acts of fleeing pursuing officers, and running a red light at an urban intersection, during the course of that flight, constitute intentional overt acts. As the driver of a vehicle is required to have an awareness of traffic signals and traffic conditions, the driver of the vehicle herein can be presumed to have been aware of the fact that the light was red. Under such circumstances, the decision to run the red light was an intentional overt act; one which "could, but [did] not, cause the death of another."

There is no more reason to require a specific intent to kill or injure in the context of attempted felony murder than in the context of felony murder itself. Indeed, such a requirement would render the offense of attempted felony murder a redundancy, as the overt act, if intended to kill, would suffice to establish the offense of attempted murder without resorting to the doctrine of attempted felony murder.

The lower court and the Respondent herein, both assert that the acts herein "do not constitute overt acts reasonably understood to result in a person's death." Pet. App. at p. 3. Once again, no such requirement can be seen in Amlotte.

Furthermore, as asserted in the Initial Brief of Petitioner, traffic fatalities arising from the acts of those who run red lights are far too common occurrence to give any serious credence to the lower court's assertion in that regard.

Even if, for policy reasons, it is decided that something more than a mere intentional overt act is required for sufficient proof of attempted felony murder, it is by no means clear why that additional requirement should be one which requires a specific intent to kill or injure. As noted above, such a requirement would essentially eliminate the need for an offense of attempted felony murder, as proof of attempted murder would exist independently in each and every case. Even more significantly, the question must be asked as to why intentional overt acts which exhibit a reckless indifference to life and personal safety - such as the running of a red light - should not satisfy the requirement of the overt act. Such acts are the very ones for which the offense of attempted felony murder is needed, as they are the ones that are not otherwise covered by attempted murder.

The Respondent raises the question of the status of an overt act which does not actually result in any injury to any victim. As the victim herein was seriously injured - rendered quadriplegic, that concern does not exist in the instant case.

In light of the foregoing discussion, the recently proposed standard jury instructions on attempted felony murder should be noted. See, Standard Jury Instructions in Criminal Cases, 636 So. 2d 502, 504-505 (Fla. 1994). The amendments set forth therein were published on May 5, 1994, and are to be effective when the opinion of the Court becomes final. 636 So. 2d at 503. As to the overt act requirement, the proposed instruction simply reiterates Amlotte's requirement that the overt act be one "which could have caused the death of (victim), but did not." 636 So. 2d at 504. There is no requirement that the overt act be one which has the intent to kill or injure. Indeed, one of the new instructions explicitly states: "In order to convict of attempted first degree felony murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill." Id. at 505. When the overt act is committed by someone other than the defendant, the defendant is responsible for that act, if the defendant was a principal in the underlying felony. Id.

Finally, the Respondent repeatedly argues that the charging document was defective because it did not refer to any overt act. The record on appeal does not reflect the existence of any pretrial motion attacking the sufficiency of the charging document. At trial, the motion for judgment of acquittal was based on the alleged insufficiency of the evidence, not the insufficiency of the charging document. (T. 398-403). The

lower court did not hold that the charging document was insufficient. The only question certified by the lower court was whether the overt act need be one which is intended to kill or injure another. There is no certified question which, in any way, touches on the sufficiency of the charging document. Furthermore, there is no pending cross-appeal in which the Respondent has attempted to interject a new issue on appeal.


Under such circumstances, any issue regarding the sufficiency of the charging document is not properly before this Court. Claims regarding insufficient factual allegations in charging documents do not constitute fundamental error and must be preserved for appellate review. Brown v. State, 473 So. 2d 1260, 1264 (Fla. 1985). For the foregoing reasons, any claim regarding the sufficiency of the charging document is not properly before this Court.

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 Reply Brief of Petitioner on the Merits was mailed this 4th day of August, 1994, to J. RAFAEL RODRIGUEZ, Esq., 6367 Bird Road, Miami, Florida 33155.



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