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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ARNOLD LEON PRATT,

Respondent.

CASE NO. 87,768

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The record on appeal, consisting of one volume of pleadings, etc. and two volumes of trial transcript, will be referred to by the symbols "R," and "T," respectively, followed by the appropriate page numbers. The petitioner will be referred to as "State" and the respondent by his last name.

STATEMENT OF THE CASE AND FACTS

By amended information, the respondent, Arnold Leon Pratt, Jr., was accused of committing attempted second-degree murder in violation of sections 782.04 and 775.087, Florida Statutes. (R. 69-70) The information alleged that Pratt drove a truck "at and into" Officer Nelson. (R. 69)

Officer Nelson, investigator with the Okaloosa County Sheriff's Office, testified at trial to the following pertinent facts: He and some other officers had the Woodward's' Porsche that was parked in the driveway of their townhouse under surveillance because of information that Pratt and his brother, Anthony, were going to steal it. (T. 104-105) At approximately 9:30 p.m., Pratt and his brother, Anthony, while riding in a Chevrolet truck, drove by the Porsche. (T. 107) They left the area but came back less than an

hour later. (T. 107) Pratt dropped Anthony off somewhere in the neighborhood. Anthony approached the Porsche. (T. 107, 111) He opened the door with a key and entered the car. (T. 108, 110) At that time, Nelson and two OSI investigators ran across the street and apprehended Anthony. (T. 108) The officers, wearing visible belt badges, identified themselves as law enforcement officers. (T. 109-110) Anthony was uncooperative but not violent. (T. 110) The officers positioned him against the back of the Porsche. (T. 111) Nelson stood right behind Anthony, and an officer stood on each side of Anthony to hold down his arms. (T. 116) One of the officers then moved away from the vehicle. (T. 111) At that point, the following happened:

I turned, and as I turned, I remained -- I kept ahold of Anthony Pratt, and we both turned at the same time in unison right behind the car, and the first thing that I saw was a pair of headlights right on top of us. He proceeded -- the truck proceeded up into the driveways which, as I said, were fairly long, completely off the roadway, and he hit myself and his brother Anthony. He accelerated -- well, I still had ahold of Anthony. At the time we were struck, I was about halfway underneath the truck, and I was holding the front bumper with my left hand. Somehow, I have no idea, but Tony was holding on to me about around my waist, somewhere around my waist area, and he was almost completely underneath the truck if not completely underneath. The truck accelerated, turned sharp left at which I went out from underneath the truck. It seems like the truck struck me on one of my shoulders. \*\*\* After he yanked it to the left, I was flung from underneath the truck into another car that was parked in a driveway that was down from the Porsche. He

proceeded back onto the roadway and all the way to the end of Sea Rover Lane, which was the street we were on, with his brother still underneath the truck. At the time he reached the end of Sea Rover Lane, he was stopped by Investigator Mark Young and Floyd Thomas.

(T. 111-112)

Anthony let out "a real shrill-type scream, and you could smell the rubber and the skin and hide being burned as that truck was going down the street." (T. 113) Nelson fired a shot into the truck's rear window as it left the scene "because I knew or felt like that if I didn't stop him he was going to kill somebody and that would have been his brother, because at that point in time he didn't know if it was -- he had no way of knowing if it was me that was under the truck or if it was his brother under the truck, so I shot to stop him." (T. 112) The truck, driven by Pratt, was stopped "maybe 150 yards" away from the Porsche. (T. 112) It was stopped by the officers who blocked off the streets. (T. 113-114) Officer Nelson suffered a bruised shoulder and pain over his entire body. (T. 117)

Pratt was taken out of the truck and put on the ground. (T. 114) Nelson and another officer went to the front of the truck to find Anthony. (T. 114-115) Although injured, Anthony got up and fought with the police until he collapsed, apparently from the loss of

blood. (T. 114-115) Pratt was taken into custody and transported to Hurlburt OSI. (T. 115)

Agent Ackley described the incident as follows:

The truck approached. It was nighttime. The lights were on, and the truck came around the corner onto Sea Rover Lane and drove directly towards us at a relatively slow rate of speed, approached us maybe twenty to twenty-five feet away at the time and slowed down almost to a stop like you would roll through a stop sign kind of thing, and I thought at that time that Arnold Pratt was going to get out of the truck to assist his brother or find out what was going on. I had redrawn my gun from my holster not knowing if he might be armed or what his state of mind was. Once he was about twenty-feet from us, the truck accelerated towards myself, Officer Nelson and Special Agent Lydsten. At that time it took me by surprise and I jumped, I yelled to the others ... and I jumped back towards the Porsche, towards the driver's side of the Porsche out of the way of the path of the vehicle. Jeff Lydsten at the time jumped the other way, and to the best of my recollection, at the time Anthony Pratt is against the vehicle, Joe Nelson is behind him kind of like holding him. The path of the truck was heading directly towards the back of the Porsche towards all of us, all four of us, and then the truck sort of turned back away from the Porsche, and it was my perception at the time that if everybody would have stayed in the exact position that we were in, the truck would have struck Special Agent Lydsten, Officer Nelson and myself. Once the truck veered back away from the Porsche, Joe -- once we let go of Anthony Pratt, Joe was left by himself with Anthony Pratt, and they were both struggling at the time. When the truck got right up to them, Anthony Pratt was turned with Joe holding on to him facing the truck. The truck struck the both of them. Both of them go down at this point under the front of the vehicle. I am on the side of the truck, the passenger side of the truck now, in full view of both of them going down. When they go to the pavement, the truck drives up over top of them, Joe Nelson lying on his back on the

street. Anthony Pratt is on top of him, and the truck tire is up over on top of them both. The truck is accelerating even more at this point. They go maybe ten feet or so. Joe Nelson gets kind of sandwiched out from underneath, rolls into a car that is parked next to the Porsche, maybe fifteen feet away or so. The truck continues at a high rate of speed, fishtails back out onto the street heading down the street, and Anthony Pratt at this time is somewhat tangled in the bumper with his arms, I believe at the time, under the tire of the truck and screaming the entire way. I remember Joe Nelson rolled up. We all got up. Joe Nelson fired one shot towards the back of the vehicle, and we had a roadblock at the end of the street approximately 150 feet down the street. Arnold Pratt comes to a stop.

(T. 144-146)

Agent Ackley further explained:

When I first saw the truck, it was turning onto Sea Rover Lane, and it was at a relatively slow rate of speed approaching the four of us in our general direction. If the truck at that point would have continued on its path, it is my belief at this point and my perception certainly then was that the truck would have struck the four of us as we were compacted into a smaller area and continued on into the Porsche. As it approached the Porsche and started to accelerate again, it veered away from the Porsche, and then on that track and the eventual track that it took, if the four of us had stayed in our positions as we were when the truck started to turn, it is my recollection that he would have missed his brother, missed the Porsche, but struck Special Agent Lydsten, Officer Nelson and myself.

(T. 162) Again Ackley stated, "What I am trying to say is with the truck turning, it was my perception that the truck turned and on that present course would have missed the Porsche, which it did, and would have missed his brother which he probably would have if



he hadn't either struggled into or been pulled into the path by Officer Nelson." (T. 183)

Without objection from defense counsel, the jury was instructed on attempted second-degree murder, attempted third-degree murder, attempted manslaughter, aggravated battery, aggravated assault, and battery. (T. 360-370, 374-376)

The verdict form read in pertinent part:

\_\_\_\_\_ Guilty of Attempted Second Degree Murder  
\_\_\_\_\_ Guilty of Attempted Third Degree Murder  
\_\_\_\_\_ Guilty of Attempted Manslaughter  
\_\_\_\_\_ Guilty of Aggravated Battery  
\_\_\_\_\_ Guilty of Aggravated Assault  
\_\_\_\_\_ Guilty of Battery  
\_\_\_\_\_ Not Guilty

(R. 99)

The jury convicted Pratt of attempted third-degree murder. (R. 99; T. 377) It further found that Pratt "used, carried, displayed, threatened to use or attempted to use a weapon in the commission of the crime" (R. 99), which in this case was a truck.

Pratt appealed his judgment of conviction to the First District. On authority of State v. Gray, 654 So. 2d 552 (Fla. 1995), the conviction was reversed with a certified question as to the appropriate remedy on remand (reduction in conviction, retrial, or discharge). Pratt v. State, 668 So. 2d 1007 (Fla. 1st DCA 1996).

SUMMARY OF ARGUMENT

The certified question should be answered affirmatively. Pratt's conviction should be reduced to attempted manslaughter. The evidence supports this offense, as well as the charged offense. In the First District's own words, "The record demonstrates unequivocally that the charge arose from a violent, dangerous, and potentially deadly incident perpetrated by the appellant." Pratt, at 1007.

Alternatively, Pratt should be granted a new trial, not discharge. The error occurred in the jury instructions (instruction on nonexistent crime as a lesser offense), and since the jury relied on the erroneous instruction, the error was harmful. The remedy for this type of error, as this Court has held on many occasions, is retrial, not discharge. The United States Supreme Court is in agreement.

ARGUMENT

CERTIFIED QUESTION

WHEN A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND-DEGREE (DEPRAVED MIND) MURDER AND IS CONVICTED BY A JURY OF THE CATEGORY 2 LESSER-INCLUDED OFFENSE OF ATTEMPTED THIRD-DEGREE (FELONY) MURDER, DO *STATE V. GRAY*, 654 SO.2D 552 (FLA. 1995), AND SECTION 924.34, FLORIDA STATUTES (1991), REQUIRE OR PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION, TO ENTER JUDGMENT FOR ATTEMPTED VOLUNTARY MANSLAUGHTER, A CATEGORY 1 NECESSARILY INCLUDED LESSER OFFENSE OF THE CRIME CHARGED?

IF THE ANSWER IS NO, THEN DO LESSER-INCLUDED OFFENSES OF THE CHARGED OFFENSE REMAIN VIABLE FOR A NEW TRIAL?

The answer to the first part of the certified question is "yes."

In an effort to free his brother in the midst of an auto theft, Pratt drove his truck into an officer who was on foot. He was charged with attempted second-degree murder and convicted of attempted third-degree murder, a lesser offense. More than a year after his trial was over, this Court held in *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995) that attempted felony murder was no longer a crime in Florida.

Section 924.34, Florida Statutes provides:

When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the

trial court to enter judgment for the lesser degree of the offense or for the lesser included offense. (e.s.)

In the case at bar, Pratt was charged with attempted second-degree murder and attempted manslaughter, a category one lesser included offense. Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983); Holland v. State, 634 So. 2d 813, 816 (Fla. 1st DCA 1994).

The plain language of section 924.34 authorizes the reduction of Pratt's conviction to attempted manslaughter. Moreover, the statute has been applied in similar situations. Paige v. State, 641 So. 2d 179 (Fla. 5th DCA 1994) (conviction under void statute), collecting cases; Harris v. State, 649 So. 2d 923 (Fla. 1st DCA 1995) (same); Ellison v. State, 547 So. 2d 1003, 1006 (Fla. 1st DCA 1989) (second-degree murder conviction reduced to manslaughter), quashed on other grounds, State v. Ellison, 561 So. 2d 576 (Fla. 1990). But see Jordan v. State, 416 So. 2d 1161, 1162 (Fla. 2d DCA 1982), approved, Jordan v. State, 438 So. 2d 825 (Fla. 1983).

The answer to the second part of the certified question likewise is "yes." The error in the case at bar was an erroneous jury instruction. The trial court instructed the jury that it had the option of convicting Pratt of attempted third-degree murder, a nonexistent crime, as a lesser offense of attempted second-degree

murder. (T. 362, 365-367, 374) The error was harmful because, as it turned out, this was the option chosen by the jury. (R. 99; T. 377)

This Court has repeatedly held that when a defendant has been convicted in a trial in which the judge instructed on a nonexistent crime as a lesser included offense, the proper remedy was retrial, not discharge. See State v. Sykes, 434 So. 2d 325 (Fla. 1983) (defendant convicted of nonexistent crime as lesser offense of grand theft); State v. Ervin, 435 So. 2d 815 (Fla. 1983) (defendant convicted of nonexistent crime as lesser offense of dealing in stolen property); Achin v. State, 436 So. 2d 30 (Fla. 1982) (defendant convicted of nonexistent crime as lesser offense of extortion); Jordan v. State, supra, (defendant convicted of nonexistent crime as lesser offense of resisting arrest with violence).

This Court's decisions are in accord with federal law. "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, ... poses no bar to further prosecution on the same charge." United States v. Scott, 437 U.S. 82, 90-91 (1978).

Montana v. Hall, 481 U.S. 400 (1987) is analogous to the instant case. The defendant there was accused of molesting his 12-year-old

stepdaughter. The State originally charged the defendant with sexual assault, but at the defendant's behest, he was tried instead for incest. The jury convicted him of incest. On appeal, the parties discovered that incest was not a crime at the time of the defendant's assault. The State, therefore, sought to retry the defendant for sexual assault. The Montana Supreme Court concluded that retrial was barred by the Double Jeopardy Clause on two grounds. First, sexual assault and incest were the same offense; and second, the defendant had been convicted of a nonexistent crime. The United States Supreme Court held that the defendant could be retried for sexual assault:

Although Montana's *ex post facto* law clause prevents Montana from convicting respondent of incest, we see no reason why the State should not be allowed to put respondent to a trial on the related charge of sexual assault. There is no suggestion that the evidence introduced at trial was insufficient to convict respondent. Montana originally sought to try respondent for sexual assault. At Respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

\*\*\* [T]he *Brown [v. Ohio]*, 432 U.S. 161 (1977) analysis is not apposite in this case. In *Brown*, the defendant did not overturn the first conviction; indeed, he served the prison sentence assessed as punishment for that crime. Thus, when the State sought to try him for auto theft, it actually was seeking a second conviction for the same offense. By contrast, respondent in this case

sought, and secured, invalidation of his first conviction. This case falls squarely within the rule that retrial is permissible after a conviction is reversed on appeal.

The Montana court also suggested that the Double Jeopardy Clause would forbid retrial because respondent was convicted of an offense that did not exist when respondent had committed the acts in question. But, under the Montana court's reading of the Montana sexual assault statute, respondent's conduct apparently was criminal at the time he engaged in it. If that is so, the State simply relied on the wrong statute in its second information. It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument. [citations omitted]

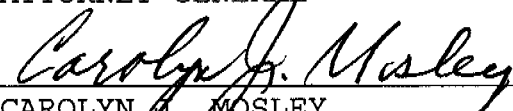
Id., at 403-404. Here, the defect happened to be in the jury instructions on lesser offenses instead of in the charging document. See, also, United States v. Davis, 873 F. 2d 900 (6th Cir. 1989).

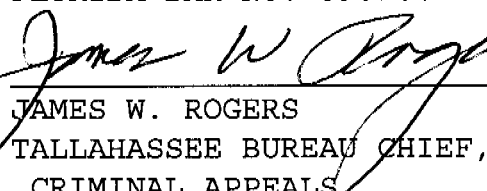
CONCLUSION

Based on the foregoing discussion, the State respectfully requests that the certified question be answered in the affirmative and the decision of the First District quashed.

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 Jamie Spivey, Assistant Public Defender, Leon County Courthouse, Suite 401 North, 301 South Monroe Street, Tallahassee, Florida 32301 this 19<sup>th</sup> day of June, 1996.

  
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