W00A 047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

LARRY CHRISTIAN,

Respondent.

CASE NO. 88,781

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as the State, Respondent, Larry Christian, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Constitution. The Court has accepted briefing on the merits based upon the existence of conflict between the decision below and Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994).

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter

referenced as "slip op."] in Larry Lee Christian v. State, slip op. Case No. 95-67, August 15, 1996. It also can be found at 21 Fla. L. Weekly D1835 (August 15, 1996).

The facts, as set forth in that opinion, establish the following:

> Appellant, Larry Lee Christian, appeals his conviction of the crime of second-degree murder, and the consecutive mandatory minimum firearm sentences imposed in connection with offenses committed during the same criminal episode. The issues presented for review are: (1) the legal sufficiency of the evidence to sustain the conviction of second-degree murder, (2) the limitation of expert testimony as to appellant's state of mind during the relevant time period, and (3) the imposition of consecutive mandatory minimum firearm sentences. We affirm in part and reverse in part.
>
> The charges here at issue arose in the context of an altercation at the Inferno Club in Perry, Florida, on the evening of February 14, 1994. Appellant, then aged sixteen, accompanied his twenty-year-old brother, Wesley, to the club. While appellant was dancing, appellant's brother Wesley and victim, Chad Ellis, engaged in an argument which quickly escalated into physical violence, The evidence indicated that the victim, Chad Ellis, threw the first punch, and **was** getting the better of appellant's brother up until the point at which appellant intervened. At some point, appellant approached the combatants and shot Ellis three times in the back. Ellis died shortly thereafter.' Thereafter, Pedro Bishop, the second shooting victim, hit appellant. Appellant struck Bishop on the head with the gun butt, whereupon Bishop

---

'The medical examiner testified that only one of the shots was fatal, but it was impossible to determine the sequence of the fatal shot, i.e., it could not be determined whether the first, second, or third shot was the actual cause of Ellis' death.

> fell to his knees, and wrapped his arms around appellant's legs. At that point, appellant fired the gun downward two more times. Keith Hampton tussled with appellant for possession of the gun and Dennis August approached with an upraised chair. Hampton ducked as August threw the chair, releasing his grasp on appellant. Appellant then ran from the club, leaving the gun on the floor.
> Slip Op. pages 2-3.

The First District Court affirmed issues one and two, but reversed the imposition of consecutive minimum mandatory firearm sentences based in part, upon Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994), stating that:

> [a]s his third issue, appellant contends that the trial court erred in imposing consecutive minimum mandatory sentences for use of a firearm for crimes which occurred during a single episode. We agree. It is improper to impose consecutive minimum mandatory sentences for use of a firearm in connection with multiple crimes committed in the course of one criminal episode. State v. Thomas, 487 So. 2d 1043 (Fla. 1986); Permenter v. State, 635 So. 2d 1016, 1017 (Fla. 1st DCA 1994); Gardner v. State, 515 so. 2d 408 (Fla. 1st DCA 1987). In Thomas, the supreme court carved an exception to the general rule announced in Palmer v, State, 438 So. 2d 1 (Fla. 1983), to hold that consecutive minimum mandatory sentences pursuant to section 775.087(2), Florida Statutes, may be imposed for offenses which arise from separate incidents occurring at separate times and places. See also Lifred v. State, 643 So. 2d 94, 99 (Fla. 4th DCA 1994).
>
> The evidence in this case shows the firearm was used in the commission of two separate offenses against two separate victims. However, there was no temporal break between the offenses, and the offenses were not committed in different locations. Thomas has been construed as prohibiting consecutive minimum mandatory sentences absent proof of separate offenses against

> separate victims, committed at separate times and places. Therefore, the consecutive firearm sentences imposed in this case must be reversed and remanded for resentencing.
> Slip Op. at 7.

In her specially concurring opinion, Judge Booth wrote that "the law on this issue is correctly stated in Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994) (interpreting Thomas; en banc). In the absence of this court's prior decisions, I would follow Lifred and affirm Appellant's sentences." Slip Op. at 9.

SUMMARY OF ARGUMENT

ISSUE I.

This Court should resolve the conflict at issue by adopting the decision in Lifred and reversing the lower court's decision in the instant case. In so doing, this Court should carry recent decisions in this area to their logical conclusion and take this opportunity to definitively clarify the law by holding that F.S. 775.021(4) and 921.16(1) specifically authorize the imposition of separate convictions and sentences for separate criminal offenses in a consecutive manner even if they occur during a single criminal episode regardless of whether the convictions carry with them minimum mandatory or enhanced terms.

ARGUMENT

ISSUE I

WHETHER F.S. 775.021(4) AUTHORIZES THE CONSECUTIVE IMPOSITION OF SEPARATE CONVICTIONS AND SENTENCES, REGARDLESS OF WHETHER THOSE SENTENCES ARE ENHANCED, FOR EACH CRIMINAL OFFENSE COMMITTED BY A DEFENDANT?

In its jurisdictional brief, the State argued that the decision below should be reversed with regard to the imposition of consecutive minimum mandatory sentences and this Court should adopt the rationale set forth in Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994) with which the lower court's decision conflicts. Between the time the State asserted the existence of conflict jurisdiction and the case was accepted for briefing on the merits, this Court has issued numerous decisions which impact on, and in fact control, disposition of the instant case. The State therefore urges this Court to resolve the conflict by adopting the decision of the Lifred Court, but also asserts that the Court should take the opportunity to clarify the law in this area and hold that F.S. 775.021(4) was clearly intended by the Legislature to authorize the imposition of consecutive multiple convictions and sentences for separate and distinct crimes, regardless of whether those crimes took place in one criminal

episode or whether those sentences carry enhancements or minimum mandatory terms.

F.S. 775.021(4) provides that:

> (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other doe not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exception to thus rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The Legislature, by the clear terms of the statute, intended to grant the trial court the discretion to sentence defendants to consecutive sentences, so long as the criminal acts constituted one or more offense. Those statutory terms are entirely consistent with section 921.16(1), Florida Statutes, which grants

total discretion to the sentencing court on whether sentences shall be consecutively or concurrently imposed.

The first case to discuss the existence of any limitation on the trial court's authority to impose consecutive minimum mandatory sentences for firearms offenses was Palmer v. State, 438 So. 2d 1 (Fla. 1983), in which this Court declined to construe F.S. 775.021 as providing for an unlimited right to impose consecutive mandatory minimums for multiple offenses arising within one criminal episode. Palmer, however, must be analyzed in terms of its highly unique factual circumstances. In that case, Palmer entered a funeral home,, and while brandishing a pistol, ordered thirteen of the mourners to throw their valuables on the floor. The Palmer Court, despite the absence of any language in F.S. 775.021 restricting the imposition of such sentences in multiple crimes involving the use of a firearm, nevertheless overruled the imposition of consecutive minimum mandatory firearm sentences where the robberies took place in the same manner and the same time and place. Writing for a divided court, Justice McDonald indicated that imposition of consecutive minimum mandatory sentences for the thirteen robberies would limit the exclusive power of the executive branch to grant either

paroles or conditional releases under sentences for crimes, which is impermissible absent express statutory provision.

In his prescient dissent to Palmer, Justice Alderman disputed the conclusion that there was evidence to support the belief that the Legislature intended to impose limitations on a trial court's ability to impose consecutive minimum mandatory sentences for crimes where separate sentences were proper under F.S. 775.087(2), stating:

> [h]ad Palmer committed thirteen separate robberies at thirteen separate houses, there would be no question that he could receive thirteen separate, consecutive, three-year mandatory minimum sentences. He should not be entitled to less than this merely because he committed the thirteen robberies in the same criminal episode. Certainly a defendant who commits multiple crimes should be punished more severely than one who commits only one crime. The legislature did not intend that crime be "cheaper by the dozen." 438 So. 2d at 42.

Several years later, this Court again interpreted Section 775.087(2) in Thomas v. State, 487 So. 2d 1043, 1044 (Fla. 1986), but distinguished Palmer due to the existence of "two separate and distinct criminal offenses involving two separate and

---

[2] The subsequent statutory amendments to section 775.021 are completely consistent with Justice Alderman's position. In this regard, see State v. Smith, 547 So. 2d 613 (Fla. 1989).

distinct victims."[3] The Lifred Court, relying upon this specific language relating to this distinguishing circumstance, found Thomas to be controlling.

Thomas was convicted of the attempted first degree murder of a woman and of the aggravated assault of her son. Consecutive minimum mandatory sentences for each of the offenses were imposed as a result of the use of a firearm. The facts revealed that Thomas first shot the woman four times in the bedroom of her trailer, before following her outside and shooting at her again as she fled. Thomas shot at the woman's son when he attempted to come to her aid and then shot the woman an additional two times.

The Thomas Court determined that under the facts of that case, it believed "the legislature intended that the trial court have discretion to impose consecutive or concurrently the mandatory minimum time served," 487 So. 2d at 1044, analogizing the circumstances of that case to the decision in State v. Enmund, 476 so. 2d 165 (Fla. 1985). In Enmund, this Court approved

---

[3] This language clearly motivated a similar result in Permenter v. State, 635 So. 2d 1016, 1016-1017 (Fla. 1st DCA 1994) in which consecutive minimum mandatory sentences were deemed proper in cases involving a single criminal transaction or episode where a defendant commits two separate and distinct offenses against two separate and distinct victims.

consecutive twenty-five year mandatory minimums for separate and distinct homicides arising from a robbery. The Thomas Court concluded that the legislative intent behind both section 775.087(2) and 775.082(1) was to vest trial courts with broad discretion to impose mandatory minimums concurrently or consecutively for separate and distinct offenses involving multiple victims.

The Lifred Court, discussing the Thomas case stated:

> ***Thomas*** can be read broadly for the proposition that attempted murder of one victim and aggravated assault or battery of **a** second victim, **or two separate shootings of two separate victims,** constitute two separate and distinct offenses justifying the imposition of consecutive mandatory minimums. However, our sister courts have interpreted ***Thomas*** to require that for crimes against multiple victims to be separate and distinct, the crimes must be separated by time and place, and not solely by the distinct act of discharging a firearm against more than one victim, even though ***Thomas*** did not reiterate the separate time and place language of ***Palmer. See Gates v. State, 633 so.*** 2d ***1158*** (Fla. 1st DCA ***1994); Woods v. State, 615 so.*** 2d 197 (Fla. 1st DCA 1993); ***Gardner v. State, 515 so.*** 2d 408 (Fla. 1st DCA 1987); ***Young v. State, 631 So.*** 2d 372 (Fla. 2d DCA ***1994); Preyer v. State, 575 So.*** 2d 748 (Fla. 5th DCA 1991).
>
> We agree that in the case of a ***single victim of multiple crimes*** arising out of single criminal episode, the analysis appropriately turns on whether offenses subsequent to the initial offense are sufficiently separated by time and place, as well as by nature of the crimes and manner of commission. In that case, the determination is whether each crime represents a separate and additional violation of the victim's rights, even if the entire criminal event arose out of

a single criminal episode. *Murray v. State, 491 So.* 2d 1120, 1124 (Fla. 1986); see e.g. Cox v. *State, 605 So.* 2d 978 (Fla. 4th DCA 1992). However, in the case of multiple victims, there are, by definition, separate violations of each victim's rights.

An analysis barring imposition of stacked mandatory minimums, merely because the crimes against multiple victims are not separated by time and place, can lead to distinctions not fostering any stated legislative policy regarding restrictions on eligibility for parole. For example, we cannot see how a criminal who shoots three victims in the course of an armed robbery while the victims remain in the same location should be punished less severely than a criminal who shoots one victim three times at three separate locations. *Compare Woods* and Kelly v. State, 552 So. 2d 206 (Fla. 5th DCA 1989), *rev. denied, 563 So.* 2d 632 (Fla. 5th DCA 1990) *with Young* and *Gardner.*

Relying primarily upon our interpretation of *Thomas,* we hold that in the case of multiple victims, the primary factor triggering the imposition of consecutive mandatory minimums is whether the firearm has been discharged more than once to shoot those victims. An analysis of the nature of the crime, manner of commission, time and place may assist in the inquiry of whether qualitatively separate and distinct criminal acts occurred; but with discharges of the firearm to injure multiple victims, separation of time or place should not be dispositive.

In the case of armed robberies of multiple victims, as in *Palmer,* the firearm is used simultaneously and in the same manner to rob more than one person. However, discharge of a firearm in the course of an armed robbery changes the nature of the crime and manner of commission. With each successive discharge of the firearm at each additional victim, the firearm is being used separately and distinctly, and in a different manner.

We do not believe that the legislature, in enacting section 775.087(2), intended to restrict the sentence that a trial court may impose on a defendant such as Lifred to a mandatory minimum of three years for each victim he injured or attempted to kill, rather than two

> mandatory minimums of three years as ordered in this case. This analysis is consistent with the reasoning of *Palmer, Thomas,* and *Murray,* which all address section 775.087(2). It also comports with the supreme court's discussion of the *Palmer* rationale in Downs v. *State,* 616 so. 2d 444 (Fla. 1993). There Justice McDonald, the author of *Palmer,* explained that:
>
> > Palmer robbed thirteen people simultaneously in a funeral home....
> >
> > ....
> >
> > In both *Palmer* and *McGourik* the minimum mandatory sentences addressed the same evils, using a firearm to commit simultaneous crimes in *Palmer* and using a destructive device . . . . in *McGourik...*
> >
> > When the same crime is committed in a nonsimultaneous manner or when different crimes are committed in the same episode, minimum mandatory sentences can be consecutive.

Because the Downs opinion was authored by Justice McDonald, the author of Palmer, it offers great insight into the rationale which underlies that opinion. Downs was convicted of the murder of his estranged wife and the aggravated assault of witnesses to the crime. He received a life sentence with a minimum mandatory twenty-five year term for the murder and a consecutive three year minimum mandatory term for use of the firearm during the commission of the aggravated assaults, thus resulting his being required to served a total of twenty-eight years prior to becoming eligible for parole. The Downs Court rejected his contention that Palmer mandated reversal of the sentence, holding

that "[w]hen the same crime is committed in a nonsimultaneous manner or when different crimes are committed in the same episode, however, minimum mandatory sentences can be consecutive." 616 so. 2d at 445. While the Court noted that it would be improper to stack the minimum mandatory for use of a firearm to kill the victim with the capital minimum mandatory sentence, it "could see no reason why a trial court cannot, in its discretion, stack those minimum mandatory sentences. Id., at 446.

The Lifred Court's conclusion is clearly in keeping with the recognition of this Court that the imposition of consecutive minimum mandatory sentences is appropriate in certain circumstances. That court held that:

> [u]nder the factual circumstances of this case, the trial court properly imposed consecutive mandatory minimums for the crimes of attempted murder and aggravated battery. The fact that the firearm was used not only to commit the armed robberies but **was** also discharged at two distinct victims located in different places (albeit in the same general vicinity) with at least some temporal break, constitutes two separate and distinct criminal acts against two separate and distinct victims as contemplated in ***Thomas.*** Even without significant temporal break or significant change in location, the nature of the crimes and manner of commission justifies stacking. We need not decide whether, even if the discharges of the firearm were seconds apart as in Gardner, or in virtually the same location as in ***Young,*** the discharges of the firearm at two victims would alone justify exercise of the trial

> court's discretion, We believe, however, this result would be consistent with legislative intent and supreme court precedent. 643 So. 2d at 99.

The analysis urged by the Lifred Court is indeed keeping with supreme court precedent and the clearly stated legislative intent that separate crimes be sentenced separately. This conclusion is amply supported by recent decisions by this Court in M.P. v. State, 21 Fla. L. Weekly S433 (Fla. October 10, 1996), Gaber v. State, No. 86,990 (Fla. December 12, 1996) and Allen v. State, No. 87,941 (Fla. December 19, 1996).

M.P. addressed the question of whether multiple firearms convictions were appropriate where multiple violations of the firearms statute occurred in a single criminal episode based upon the Court's decision in State v. Stearns, 645 So. 2d 417 (Fla. 1994). The Court limited Stearns to its exact facts and the specific offenses at issue[4], stating that case "should not be interpreted as finding that double jeopardy bars multiple convictions and sentences for all firearm crimes that arise out of the same criminal episode," 21 Fla. L. Weekly at 5434. The Court recognized that the United States Supreme Court has held,

---

[4] Stearns was convicted of burglary of a structure while armed, grand theft of the property in that structure, and carrying a concealed firearm while committing a felony.

in Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), that:

> [w]here, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

The Court concluded that dual adjudications were not precluded even where the offenses at issue stemmed from the same conduct by M.P.

In Gaber, the Court resolved an interdistrict conflict[5] over whether separate convictions and sentences for armed burglary and grand theft of a firearm arising from a single criminal episode violate principles of double jeopardy. Citing to M.P., the Gaber Court resolved the conflict, approving the lower court's decision in Gaber, holding that double jeopardy did not preclude separate convictions because both crimes required proof of separate statutory elements under F.S. 775.021(4) (a). The Court stated that:

---

[5] The cases at issue were Marrow v. State, 656 So. 2d 579 (Fla. 1st DCA 1995), in which this Court denied review, at 664 so. 2d 249(Fla. 1995), and Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995) .

> [i]n sum, the legislature set forth its rule of statutory construction in section 775.021(4)(b), Florida Statutes (1993), which clearly states that "[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction." In the instant case, legislative intent dictates that both crimes be prosecuted and that double jeopardy presents no constitutional bar. No. 86,990 at pages 4-5.

Allen presents a case which is even more compelling. There, the Court addressed a question certified to be of great public importance, i.e, whether a defendant could be separately convicted and sentenced for armed burglary, armed robbery, and armed kidnaping where each offense was part of a single criminal episode. Relying upon its prior decisions in M.P., and State v. Maxwell, 21 Fla. L. Weekly S429 (Fla. October 10, 1996), this Court answered the certified question in the affirmative and approved the lower court's decision below. There, the First District Court of Appeal held that State v. Stearns, 645 So. 2d 417 (Fla. 1994) and its progeny did not compel the court to reverse two of the convictions in that case. The lower court held that it was not required to follow Stearns in that case given the fact that each of the crimes contained elements which were separate and distinct so that none of the offenses were deemed to constitute criminal acts solely due to the defendant's possession of a firearm. The court concluded:

> [i]t is somewhat unclear, however, whether each offense may be enhanced as a result of the use of the same firearm during one criminal episode. We therefore, affirm, but certify the following question as being one of great public importance:
>
> WHETHER APPELLANTS MAY BE SEPARATELY CONVICTED AND SENTENCED FOR ARMED BURGLARY, ARMED ROBBERY, AND ARMED KIDNAPING WHERE EACH OFFENSE IS PART OF THE SAME CRIMINAL EPISODE. 671 so. 2d at 234.

Thus, this Court has held in Allen that offenses which are separate and distinct may be separately convicted and sentenced, regardless of whether they occur within one criminal episode. Finally, in State v. Craft, No. 87,545 (Fla. December 26, 1996), this Court held that when a defendant who commits separate offenses during the same criminal episode each of which involves a firearm, and each of which contain separate and distinct elements of proof, may be convicted and sentenced for each offense.

Application of this rationale to the facts of the case at issue, establish the appropriateness of the Lifred decision in contrast with that reached by the lower court in Christian with regard to consecutive sentencing. This Court should adopt the rationale of Lifred and overrule the lower court's decision in Christian which stands in opposition to both the law and precedent of this Court. In so doing, the State urges this Court to carry the holding of its recent decisions in M.P., Gaber,

Allen, and Craft to its logical conclusion, clarifying the law in this area, by specifically holding that F.S. 775.021(4) authorized the imposition of separate convictions and sentences for separate offenses committed by a defendant which may be imposed consecutively, regardless of whether the offenses were committed in a single episode and regardless of whether said convictions carry with them minimum mandatory or enhanced terms. Sections 775.021(4) and 921.16(1) make it unmistakably clear that the trial court has complete discretion to impose all sentences either consecutively or concurrently. There is no logic in declaring that this legislative language applies to some sentences but not to others.

CONCLUSION

Based on the foregoing, the State respectfully submits the that this Court should reverse the lower court's decision and hold that consecutive minimum mandatory sentences are appropriate where a defendant commits separate criminal offenses in the course of a criminal episode.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Giselle Lylen Rivera for
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

Giselle Lylen Rivera
GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) **488-0600**

COUNSEL FOR PETITIONER
[AGO# L96-1-4601]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of December, 1996.

Giselle Lyden Rivera

Giselle Lyden Rivera
Assistant Attorney General

[C:\USERS\CRIMINAL\GISELLE\CHRISBI.WPD --- 12/27/96,1:45pm]

Appendix

Copy

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

LARRY CHRISTIAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-67

Opinion filed August 15, 1996.

An appeal from the Circuit Court for Taylor County. James Roy Bean, Judge.

Nancy A. Daniels, Public Defender and Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

JOANOS, J.

Appellant, Larry Lee Christian, appeals his conviction of the crime of second-degree murder, and the consecutive mandatory minimum firearm sentences imposed in connection with offenses committed during the same criminal episode. The issues presented

for review are: (1) the legal sufficiency of the evidence to sustain the conviction of second-degree murder, (2) the limitation of expert testimony as to appellant's state of mind during the relevant time period, and (3) the imposition of consecutive mandatory minimum firearm sentences. We affirm in part and reverse in part.

The charges here at issue arose in the context of an altercation at the Inferno Club in Perry, Florida, on the evening of February 14, 1994. Appellant, then aged sixteen, accompanied his twenty-year-old brother, Wesley, to the club. While appellant was dancing, appellant's brother Wesley and victim Chad Ellis engaged in an argument which quickly escalated into physical violence. The evidence indicated that the victim, Chad Ellis, threw the first punch, and was getting the better of appellant's brother up until the point at which appellant intervened. At some point, appellant approached the combatants and shot Ellis three times in the back. . Ellis died shortly thereafter.[1] Thereafter, Pedro Bishop, the second shooting victim, hit appellant. Appellant struck Bishop on the head with the gun butt, whereupon Bishop fell to his knees, and wrapped his arms-around appellant's legs. At that point, appellant fired the gun downward two more times. Keith Hampton tussled with appellant for possession of the gun and Dennis

[1]The medical examiner testified that only one of the shots was fatal, but it was impossible to determine the sequence of the fatal shot, i.e., it could not be determined whether the first, second, or third shot was the actual cause of Ellis's death.

August approached with an upraised chair. Hampton ducked as August threw the chair, releasing his grasp on appellant. Appellant then ran from the club, leaving the gun on the floor.

When these events occurred, neither appellant nor his brother had a criminal history. However, the other combatants, including both victims, had significant prior criminal records. A Perry police officer testified that he knew both victims, and that both young men had reputations for violence in the community.

The defense theory was that appellant feared Chad Ellis would kill or seriously injure his brother, and because of this fear, appellant used force to defend his brother from Ellis and to defend himself from Bishop. In his first issue, appellant contends the evidence presented at trial was legally insufficient to sustain his conviction of any offense more serious than manslaughter. We disagree. Second degree murder is defined in section 782.04(2), Florida Statutes, as:

> (2) The unlawful killing of a human being, when perpetrated by 'any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, . . .

"An act is considered imminently dangerous to another and evincing a depraved mind if it is an act that (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily -injury to another, (2) is done from ill will, hatred, spite, or an evil intent, and (3) is of such a nature that

the act itself indicates an indifference to human life." Convers v. State, 569 So. 2d 1360, 1361 (Fla. 1st DCA 1990). See also Roberts v. State, 425 So. 2d 70, 71 (Fla. 2d DCA 1982), review denied, 434 So. 2d 888 (Fla. 1983)("Depravity of mind means malice in the sense of ill will, hatred, spite or evil intent").

The use of force in defense of person is governed by section 776.012, Florida Statutes, which states:

> A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another or to prevent the imminent commission of a forcible felony.

The acts deemed to constitute the imminently dangerous and depraved mind elements of second-degree murder depend upon the circumstances of each case. See Andrews v. State, 577 So. 2d 650 (Fla. 1st DCA), review denied, 587 So. 2d 1329 (Fla. 1991); Brown v. State, 454 So. 2d 596 (Fla. 5th DCA), review denied, 461 So. 2d 116 (Fla. 1984); Pierce v. State, 376 So. 2d 417 (Fla. 3d DCA 1979), cert. denied, 386 So. 2d 640 (Fla. 1980); McDaniel v. State, 620 So. 2d 1308 (Fla. 4th DCA 1993).

We are cognizant that some of the facts of this case are somewhat similar to those involved in several of the cited cases in which second degree murder convictions have been reversed and remanded with directions to reduce the conviction to manslaughter. We also recognize that the evidence established Chad Ellis was the

aggressor in the fight with appellant's brother, Wesley; Ellis was getting the better of Wesley; and that Ellis', friend, Pedro Bishop, moved toward the combatants before the shooting occurred, suggesting increased peril to appellant's brother.

However, evidence presented in support of the jury's verdict includes undisputed testimony that appellant was the only person involved in the altercation who used a weapon during the incident. Further, the evidence established that appellant shot Ellis three times in the back at close range. We believe these particular facts distinguish this case from those cases in which a second degree murder conviction was reduced to manslaughter or justifiable homicide. On the basis of these facts, the jurors were entitled to conclude that appellant used excessive force toward an unarmed aggressor, and that the act of firing three successive shots into the back of an individual engaged in a fist fight evinced the depraved mind regardless of human life essential to a conviction of second degree murder,.

As his second issue, appellant contends the trial court improperly limited the expert testimony regarding appellant's state of mind at the time of the shooting. Again, we disagree. The trial court has broad discretion in determining the matters which are the proper subject of expert testimony. ~~Johnson v. State~~, 393 so. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). In the exercise of that discretion, the trial court in this case permitted appellant to

offer evidence concerning the reason he feared Ellis, and the defense expert explained the degree and nature of fear appellant felt during the incident. Appellant's expert tvas permitted to testify that appellant functions at a marginal level of intelligence; he has a passive dependent personality; and he lacks self-confidence. The expert explained that the combination of these factors impairs appellant's ability to make quick and reasonable decisions when confronted with crisis situations. The expert further testified that appellant's inability to remember anything that happened immediately after the first shot was fired was consistent with the anxiety and panic he felt at the time.

It appears the expert testimony admitted at trial was sufficient for the jurors to evaluate the nature of appellant's fear at the time of the shooting, and to determine the effect of that fear in relation to appellant's use of force. The testimony appellant wished to elicit would have told jurors that appellant was in a state of f-ear which caused him to believe that shooting Ellis was the only means available to him to prevent Ellis from killing or seriously injuring his brother. It is improper to permit an expert to express an opinion which applies a legal standard to a set of facts. See Gurganus v. State, 451 So. 2d 817, 821 (Fla. 1984); Shaw v. State, 557 So. 2d 77 (Fla. 1st DCA 1990). See also Ehrhardt, Florida Evidence § 703.1 at 524 (1996 Edition).

As his third issue, appellant contends the trial court erred in imposing consecutive minimum mandatory sentences for use of a firearm for crimes which occurred during a single episode. We agree. It is improper to impose consecutive minimum mandatory sentences for use of a firearm in connection with multiple crimes committed in the course of one criminal episode. State v. Thomas, 487 So 2d 1043 (Fla. 1986); Permenter v.State, 635 So. 2d 1016, 1017 (Fla. 1st DCA 1994); Gardner v. State, 515 So. 2d 408 (Fla. 1st DCA 1987). In Thomas, the supreme court carved an exception to the general rule announced in Palmer v. State, 438 So 2d 1 (Fla. 1983), to hold that consecutive minimum mandatory sentences pursuant to section 755.087(2), Florida Statutes, may be imposed for offenses which arise from separate incidents occurring at separate times and places. See also Lifred v. State, 643 So. 2d 94, 99 (Fla. 4th DCA 1994).

The evidence in this case shows the firearm was used in the commission of two separate offenses against two separate victims. However, there was no temporal break between the offenses, and the offenses were not committed in different locations. Thomas has been construed as prohibiting consecutive minimum mandatory sentences absent proof of separate offenses against separate victims, committed at separate times and places. Therefore, the consecutive firearm sentences imposed in this case must be reversed and remanded for resentencing.

Accordingly, we reverse the consecutive minimum mandatory firearm sentences, and remand for imposition of concurrent minimum mandatory sentences. We affirm as to the other issues raised by appellant.

BENTON, J., CONCURS. BOOTH, J., SPECIALLY CONCURRING WITH WRITTEN OPINION.