ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

LARRY LEE CHRISTIAN,

Respondent.

CASE NO. 88,781

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The State readopts the designations of the parties as set forth in its Initial Brief on the Merits. References to the Record on Appeal will be made by citation to the volume ("V") ' number and page.

STATEMENT OF THE CASE AND FACTS

The State readopts the statement of the case and facts set forth in its initial brief as they relate to issue I. It disputes the facts set forth by the Respondent in support of issue II, which he raises for the first time in the "respondent's brief on the merits." Pursuant to Florida Rule of Appellate Procedure 9.210, the State deems that pleading an answer brief, no cross-appeal existing with regard to this issue, and files only a reply brief, thus ending the briefing in this irregular proceeding. Since those facts are not set forth in a fair and complete fashion or in a manner which favors the prevailing party below, Thompson v. State, 588 So. 2d 687, 689 (Fla. 1st DCA 1991), the State provides the following.

M.E., Thomas Woods, testified Ellis' body had three entry bullet wounds to the back. (V. II, 25-7).

Hampton was an acquaintance of the defendant for 5-6 years; the defendant's brother Wesley was a high school friend. (V. II,

46-7, 49). Hampton sat around the club with Ellis, Bishop, and August; the defendant and Wesley were there, but neither group spoke to the other. (V. II, 47-50). Neither he, Bishop, nor Ellis had prior problems with the Christian brothers. (V. II, 71). Bishop and Ellis walked towards the bricks while talking. (V. II, 51). Hampton saw Ellis and Wesley "up in each other's face" and they began fighting, but he could not hear what was said. (V. II, 52). Ellis swung at Wesley who fought back. (V. II, 53). Bishop turned to look; the defendant walked around Bishop, pulled a gun out of his pants, and shot Ellis three times. (V. II, 55). The fight was between Ellis and Wesley when the defendant came up. (V. II, 63). Bishop tried to help Ellis and began "tussling" with the defendant who beat him in the head with the gun before shooting him in the back. (V. II, 56). Hampton tried to grab the gun from the defendant to stop the defendant from killing someone, while the defendant tried to fire it into his face. (V. II, 56-7, 64). When August came over with a chair, the defendant abandoned the gun and ran out of the club. (V. II, 58-9). Someone told him that August hit Wesley with the chair to stop Wesley from beating Bishop in the head with a chair. (V. II, 65). Ellis was dead on the floor. (V. II, 61).

Debra Hugger knew Ellis, Bishop, and the Christians; she observed no fights or trouble between them. (V. II, 83-5). She had no knowledge of what happened prior to the shots; she saw Ellis fall to the floor after the first shot while the defendant stood over him firing two or three times. (V. II, 86-9). Ellis just lay there; he couldn't do anything. (V. II, 88). She ran into the ladies room; when she came out, she saw Wesley beating Bishop with a chair. (V. II, 88). August ran up, grabbed the chair from Wesley, and hit him with it before Wesley ran out of the club. (V. II, 89-90).

Bishop had no hard feelings towards the Christians and was aware of none they held towards him. (V. II, 102). He observed, but could not hear, a verbal altercation between Wesley and Ellis, which ended in a fist fight in which no weapons were used. (V. II, 104-7). Ellis was getting the best of the fight towards the end. (V. II, 106). The defendant came from behind him, taking a position 2-3 yards away and firing four times directly at Ellis. (V. II, 107-9). Ellis fell to the floor after the first shot; there were pauses between the shots. (V. II, 109).

Bishop went to keep Ellis from being murdered, but the defendant fired two more times and struck Bishop in the head with the gun, knocking him to his knees. (V. II, 110-11). When

Bishop grabbed the defendant's legs, the defendant shot him in the back, resulting in an injury necessitating a colostomy. (V. II, 112, 117). The second shot missed and Hampton struggled with the defendant for the gun. (V. II, 113).

Roselyn Thomas did not know what caused the fight. (V. III, 146, 152). Shortly after the fight between Wesley and Ellis, she heard shots from the defendant's gun. (V. III, 146-7). There were pauses between the shots. (V. III, 148). She could not say that Ellis, Bishop, and August were hanging out as a "group." (V. III, 158).

August had no problems with the defendant and knew Wesley only by sight, (V. III, 165). He did not see what led up to the shooting and ran into the bathroom; he heard a total of 4-5 shots. (V. III, 166-7). When he came out, Wesley was on top of Bishop beating him; Bishop just lay there as though he was unconscious. (V. III, 168). August charged in picking up a chair and hitting Wesley; Hampton ran into the defendant. (V. III, 168). Wesely ran out of the club and the defendant followed. (V. III, 168).

McAllister did not know what led up to the fight. (V. III, 183-5). He heard a gun fired and saw Ellis face down on the floor. (V. III, 186). Wesley was hitting someone, who he later

learned was Bishop, with a chair and only stopped when August came up and hit him with a chair. (V. III, 187-8).

Wesley testified that the defendant was totally unaware of what was occurring prior to his tussling with Ellis. (V. IV, 289, 309, 293). He contended that the fight involved Ellis and "all of them." (V. IV, 293, 295, 301). He denied seeing the defendant shoot Bishop, but also stated that the gun just went off when they were fighting for it, and that the defendant did not mean to shoot him. (V. IV, 301). Although he admitted fighting Ellis, he denied hitting him. (V. IV, 312).

The defendant stated that although several persons were "on" his brother, he shot only one of them. (V. IV, 343) . He admitted that he could have either pulled Ellis off his brother, or hit him with a chair, either of which would not have killed him. (V. IV, 352-3). He took the gun away from a friend that night because he was afraid the friend would injure someone. (V. IV, 345). Bishop was on top of him when the gun went off; the defendant also stated that Bishop shot himself while trying to disarm him. (V. IV, 357).

Over State objection, due to discovery violations, Dr. Mahatre testified that the defendant was sane at the time of the crime. (V. IV, 398). Dr. Scott, who performed IQ testing, characterized

the defendant's IQ as "low-average." (V. IV, 407). He stated that the defendant's personality type was likely to avoid conflict and back off. (V. v, 471). The defendant did not tell him that Bishop was kicking his brother, nor did he claim that he was himself being attacked prior to the time he shot the gun. (V. v, 492). The defendant did say that Wesley jumped on Bishop after the defendant had shot Bishop in the stomach. (V. v, 492). He also stated that he, not Wesley, had jumped on Hampton. (V. v, 492). The defendant never told him what Wesley was doing during the incident except for the fact that they ran out of the club at the end. (V. v, 492). The doctor did not report any statement by the defendant to the effect that he was afraid. (V. v, 493). The defendant's MMPI indicated that he was attempting to pick the answers which would present him most favorable. (V. v, 495). The defendant received grades of A and B in those school classes which he liked. (V. V, 496). The defendant knew the difference between right and wrong on the night in question, understood the consequences of his actions, and was able to conform his behavior to the requirements of the law. (V. V, 501).

Dr. Jackson testified that the defendant's IQ fell in the low normal range. (V. v, 510-11). The report relied upon by the

defense which characterized the defendant as a passive dependent personality did not support the diagnosis which he stated should not be used in relation to adolescents. (V. V, 512). A passive dependent personality does not predispose a person to violence. (V. V, 514). The highest score on the test was a lie score which indicated that the defendant was either denying or evading questions or he did not understand them. (V. V, 513).

SUMMARY OF THE ARGUMENT

The State readopts is summary as set forth in its initial brief as to issue I. With regard to issue II, the District Court did not err holding the trial court properly submitted the case to the jury on the charge of second degree murder since ample evidence of ill will, hatred, spite, and evil intent was presented.

ARGUMENT

ISSUE I

WHETHER FS 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?

The State readopts the argument set forth in its initial brief on the merits, as the "answer brief" of the respondent merits no additional response.

ISSUE II

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR IN SENDING THE CASE TO THE JURY?

The Respondent raised this issue, for the first time in his "Respondent's Brief on the Merits," despite the fact that no cross-appeal on this point is before this Court. In so doing, he also ignores the presumptions of correctness afforded evidentiary conflicts. Inman v. State, 191 So. 2d 12 (Fla. 1939); Walden v. State, 191 So 2d 68 (Fla. 1st DCA 1966). He also ignores the fact that on appeal, it is not the function of the court to either retry the case or substitute its judgement for that of the jury. Only where the evidence is wholly insufficient to support the verdict may the court reverse. Jones v State, 3 So. 2d 388 (Fla. 1941); Parrish v. State, 97 so. 2d 356 (Fla. 1st DCA 1957); Stewart v. State, 221 so. 2d 155 (Fla. 3d DCA 1969).

In essence in this claim, the defendant asserts that he was justified in intervening in a fist fight between his brother and Ellis, and in so doing, coming up behind Ellis, who was unarmed, and shooting him three times in the back, on the grounds of self-defense and defense of another. Since the undisputed facts establish that the defendant's life was in no way endangered at the time he shot Ellis in the back, he cannot be said to have a

right to use deadly force in self defense pursuant to FS 782.02. The question then becomes whether he had the lawful right to use deadly force to defend his brother.

The facts fail to establish that the defendant either believed Ellis was armed or that he had a reputation in the community of which the defendant was aware for carrying a gun. The evidence does, however, establish, that the fight between Wesley and Ellis involved only fists. Wesley was fighting Ellis, although one witness stated that at the end, it appeared that Ellis was getting the better of it. All of the witnesses at trial, with the exception of the defendant, stated the defendant came up behind Ellis, shooting him in the back several times. All of them stated Ellis fell to the ground after the first shot and one described him as helpless from that point on. The defendant stood over Ellis and fired two or three additional shots; the testimony established there were pauses between the shots.

With regard to the shooting of Bishop, the facts are even less favorable to the defendant. The record establishes that Bishop went to Ellis' aid after Ellis was shot three times. When Bishop attempted to grab the gun to disarm the defendant to prevent him from killing Ellis, the defendant struck Bishop in the head with the gun, knocking him to his knees. As Bishop held onto the

defendant's legs to try to avoid loosing consciousness, the defendant shot him in the back. There was no evidence of any prior altercations or problems between any of the parties to the incident.

FS 782.04(2) defines second degree murder as " the unlawful killing of a human being, when perpetrated by any act eminently 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." The defendant, in discussing the issue, improperly limits his definition of depraved mind to mere ill will, spite, or hatred. Depraved mind "is not limited in its meaning to hatred, ill will and malevolence, but 'denotes a wicked and corrupt disregard of the lives and safety of others."' Hines v. State, 227 So. 2d 334, 336 (Fla. 1st DCA 1969) (firing gun at the head of victim evinced depraved mind). An act eminently dangerous to another is recognized as one which a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another. In this case, the defendant's actions are both illustrative of ill will and a wicked and corrupt disregard for the safety of others. Under the circumstances of this case, a person of ordinary judgment would certainly know such actions

would cause either death or serious injury. The defendant's mental health expert testified the defendant was aware of the consequences of his actions at the time of the shootings.

None of the cases relied upon by the defendant support a claim of defense of another and are easily distinguishable. See: Roberts v. State, 425 So. 2d 70 (Fla. 2d DCA 1982), rev. denied, 434 so. 2d 888 (Fla. 1983) (claim of self-defense rejected where Roberts shot decedent 4-5 times after first successfully restraining decedent who was the first to arm himself); Pearce v. State, 18 So. 2d 754 (Fla. 1944) (different standard applies where decedent was armed trespasser on Pearce's property); Martinez v. State, 360 So. 2d 108 (Fla. 3d DCA 1978), cert. denied, 367 So. 2d 1125 (Fla. 1979) (conviction reduced to second degree murder where Martinez went to daughter's aid against husband's assault and decedent husband assaulted Martinez immediately on his arrival); Pierce v. State, 376 So. 2d 417 (Fla. 3d DCA 1979), cert. denied, 386 So. 2d 640 (Fla. 1980) (conviction reduced to second degree murder where death was the culmination of a fight begun by the decedent in which Pierce was merely a reluctant participant who made every effort to avoid confrontation); Borders v. State, 433 So. 2d 1325 (Fla. 3d DCA 1983) (self-defense found where decedent was aggressor and had a

history of violence against'defendant); Raneri v. State, 255 So. 2d 291 (Fla. 1st DCA 1971) (different standard applies where person is attacked in his own home by someone he subsequently kills); Ramos v. State, 496 So. 2d 837 (Fla. 2d DCA 1986) (conviction reduced where decedent attacked Ramos who tried unsuccessfully to leave the bar); Brown v. State, 454 So. 2d 596 (Fla. 5th DCA 1984), rev. denied, 461 So. 2d 116 (Fla. 1984) (evidence supported claim decedent beating Brown's brother to death; when Brown went to break up the fight, decedent attacked Brown, threatening to kill him); McDaniel v. State, 620 So. 2d 1308 (Fla. 4th DCA 1993) (conviction reduced where son/decedent began altercation, hitting defendant and knocking him to ground; no evidence that use of knife to ward off further attack was act involving ill will, hatred, spite, or evil intent); Williams v. State, 674 So. 2d 177 (Fla. 2d DCA 1996) (conviction reduced to second degree where decedent, who was belligerently drunk, started the attack on defendant who was recuperating from surgery, a prior attempt to subdue decedent by calling the police was unsuccessful, decedent followed defendant into defendant's room before defendant stabbed decedent with a knife because the evidence did not establish ill will, hatred, spite, or evil intent).

In the instant case, the record establishes that the defendant was not involved in the original confrontation which was nothing more than a tussling match on the floor between Wesley and Ellis; thus, nothing proves, or even hints, that Wesley was in mortal danger. Rather than seeking to avoid the confrontation, the defendant purposefully interjected himself into it, shooting an unarmed man in the back, and then, after that man fell incapacitated to the ground, continuing to shoot him in the back with pauses between the shots. As noted by this Court in Baker v. State, 506 So. 2d 1057, 1059 (Fla. 1987), "the use of deadly force against another human being under the circumstances of this case... went far beyond declining human decency and is not countenanced by the law even if that force is used in response to conduct of human being who act like animals."

Given the existence of extensive, ample evidence from which the jury could reject the defendant's claim of self-defense or defense of his brother, this Court may not substitute its opinion of the evidence for that of the jury. This is so even though evidence of self-defense or defense of another might exist in the record. Arnold v. State, 241 So. 2d 192 (Fla. 3d DCA 1970); Rodriguez v. State, 559 SO. 2d 392 (Fla. 3d DCA 1990). The

defendant is not entitled to the reduction of his sentence as a matter of law.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the decision of the District Court of Appeal should be reversed as to the first issue and affirmed as to the second.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY 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 19th day of February, 1997.

Giselle Lyden Rivera

Giselle Lyden Rivera
Assistant Attorney General

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