IN THE SUPREME COURT OF FLORIDA

RONALD NESBITT,

Petitioner,

v. S.Ct. Case No. SC02-1723

STATE OF FLORIDA, DCA Case No. 5D01-0203

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

RICHARD E. DORAN
ATTORNEY GENERAL

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0931160

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0618550
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, Florida
32118

(386) 238-4990 (telephone)

(386) 238-4997 (fax)

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On January 14, 2000, the State of Florida filed an information charging Petitioner with one count of attempted second degree murder (with a weapon) and one count of aggravated battery with a deadly weapon. (V. 1, 4-5). As to the first count, the information alleged that the Petitioner:

> in violation of Florida Statutes 782.04(2), 777.04 and 775.087(1), by an act imminently dangerous to another, and evidencing a depraved mind regardless of human life, attempt to kill DOROTHEA NESBITT, by attacking her with a stun gun and placing a pillow on her face, and in the course of committing said offense, RONALD NESBITT did carry, display, or use threaten to use, or attempt to use a weapon.

(V. 1, p. 4). In the second count, the information charged that Petitioner committed the battery while using "as stun gun, a deadly weapon." (V. 1, p. 5).

The case went to trial on November 9-10, 2000. The State called Dorothea Nesbitt. (V. 2, p. 13). She testified that she had been married to Petitioner since 1997. (V. 2, p. 15). On the date of the crime, December 19, 1999, they were living together. On December 17, 1999, she observed a stun gun in her living room. (V. 2, p. 19). When she asked him about it, he took it away from her, and she did not see it again until December 19, 1999. (V. 2, p. 20). On that evening, they

became involved in an altercation regarding finances. (V. 2, p. 21). He went into the garage, retrieved the stun gun, and began shocking Dorothea. (V. 2, p. 21-22). As she fell to the ground, he continued applying the electric shock to her chest and the sides of her rib cage. (V. 2, p. 22-23). Dorothea also testified that she had been having heart problems, and the Petitioner was aware of them. (V. 2, p. 23). He kept saying he had to "finish it." She interpreted this as a statement that he had acquired the stungun with the intent of using it to kill her. (V. 2, p. 46). He picked her up and threw her down again. (V. 2, p. 24). He began stunning her again. (V. 2, p. 24). He grabbed her dog's pillow, placed it over her face and pressed it down, all the while continuing to apply the stun gun. (V. 2, p. 24-25). Dorothea testified that she was unable to breathe. (V. 2, p. 25). She screamed out, "You are trying to kill me." (V. 2, p. 25). He responded, "That's what I got this for." (V. 2, p. 26). She told the jury that she believed that she was going to die. (V. 2, p. 26). Dorothea managed to escape, ran to a neighbors house, and summoned the police. (V. 2, p. 27).

Dorothea testified that she had blisters and welts from the stun gun. (V. 2, p. 29). The State introduced into

evidence photographs of the dog pillow, the victim's injury and the stungun. (V. 2, p. 31).

Evelyn Rivera, the neighbor who summoned 911, testified that when Dorothea came to her door, she was screaming and saying that someone had tried to kill her. (V. 2, p. 71-73). Rivera confirmed the presence of marks on Dorothea's body from the stungun. (V. 2, p. 73). Likewise, James Bainbridge, the responding patrol officer, testified that he observed the blister marks on her rib cage and that Dorothea was very upset. (V. 2, p. 81). Officer Bainbridge retrieved the stungun off the kitchen counter in Dorothea's residence. (V. 2, p. 82). Petitioner admitted to shocking Dorothea with the stungun, but told Officer Bainbridge that he covered her face with the dog pillow to keep her from screaming. (V. 2, p. 85). Petitioner also told him that he believed that Dorothea was probably in fear for her life. The jury was instructed on attempted second degree murder with a deadly weapon with the lesser included offenses of attempted second degree murder, aggravated assault, battery and assault. (V. 3, p. 258-280). On Count II, the court instructed the jury on aggravated battery with the lesser included offenses of aggravated battery, attempted aggravated battery, battery and improper exhibition of a deadly weapon. (V. 2, p. 258-280).

The jury returned guilty verdicts on the lesser offenses of aggravated assault and battery. (V. 2, p. 49-52). The jury found in a special verdict the Petitioner used a weapon in committing the aggravated assault. (V. 2, p. 49-52).

On appeal, the Fifth District Court of Appeal addressed the issue of whether the aggravated assault conviction could stand because the charging document did not allege a “deadly” weapon in Count I. The appellate court concluded that Petitioner waived the right to appeal this issue because defense counsel specifically agreed that the jury should be instructed on this lesser included offense. The court certified interdistrict conflict to this Court on this issue.

SUMMARY OF THE ARGUMENT

The State charged the Petitioner with attempted second degree murder. At the jury instruction conference, Petitioner agreed to several lesser included offenses including aggravated assault. The jury was instructed accordingly, and convicted Petitioner of aggravated assault. On appeal, the Fifth District Court of Appeal found that Petitioner was convicted of a crime which exceeded the allegata of the charging document–that is, the information did not sufficiently allege each and every element of aggravated assault. However, the appellate court found that by agreeing to the lesser included offenses, Petitioner waived any deficiency in the information. The Fifth District Court of Appeal certified conflict on the question of whether this is an issue which may be waived.

Respondent asserts that the question of the certified conflict need not be addressed because the Fifth District Court of Appeal erred in concluding that the elements of aggravated assault were not sufficiently alleged in the information. Alternatively, Petitioner's oral agreement to the lesser included offenses is sufficient to waive any complaint that he was convicted of a crime not sufficiently charged in the information.

ARGUMENT

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE ALLEGATA OF THE INFORMATION EXCEEDED THE PROBATA OF THE CONVICTION; THE APPELLATE COURT CORRECTLY RULED THAT PETITIONER AFFIRMATIVELY WAIVED THE RIGHT TO APPEAL THIS ISSUE.

Petitioner was charged with attempted second degree murder, and found guilty of the lesser included offense of aggravated assault. In Nesbitt v State, 819 So. 2d 993 (Fla. 5th DCA 2002), the Fifth District Court of Appeal found that the information did sufficiently allege the elements of aggravated assault, but affirmed on the ground that Petitioner had waived the ability to raise this issue on appeal. Although the appellate court certified interdistrict conflict on the waiver issue, this Court does not need to reach that question because the appellate court erred on the first point.

Petitioner was charged under an information alleging:

> in violation of Florida Statutes 782.04(2), 777.04 and 775.087(1), by an act imminently dangerous to another, and evidencing a depraved mind regardless of human life, attempt to kill DOROTHEA NESBITT, by attacking her with a stun gun and placing a pillow on her face, and in the course of committing said offense, RONALD NESBITT did carry display, use threaten to use, or attempt to use a weapon.

(V. 1, p. 4). Petitioner asserts that this information did not sufficiently allege aggravated assault because it did not include the language “deadly weapon.” However, the State did not need to allege attempted murder with a deadly weapon. If an information charges attempted murder with a weapon, then ipso facto, the State has charged that the weapon is being used in a deadly fashion. If the prosecution introduces evidence of a weapon, and it is used in a manner likely to cause death or great bodily harm, then the probata (the proof offered at trial) does not exceed the allegata set forth in the charging documents. The adjective “deadly” in the information is surplusage. The information informed the Petitioner that he was charged with using a weapon (or weapons) in a deadly manner.

In Brown v State, 206 So. 2d 377, 382 (Fla. 1968), this Court observed that all of the essential elements of a lesser included offense must be alleged in the indictment under which the accused is charged. Some lesser included offenses are necessarily included with the ambit of the charged crime. (Schedule 1). See Florida Standard Jury Instructions in Criminal Cases. However, there are other lesser offenses which may or may not be included within the charged offense depending upon the accusatory pleading and the evidence at

trial. (Schedule 2). In State v Anderson, 270 So. 2d 353, 357 (Fla. 1972), this Court explained that a defendant may be convicted on any lesser offense which, ”is spelled out in the accusatory pleading in that it alleges all of the elements of the lesser offense and the proof at trial supports the charge.” It is up to the trial judge to examine the information to determine whether it alleges all of the elements of a lesser offense. Id. at 393. The reason for this rule is “the organic requirement that the accusatory pleading apprise the defendant of all offenses in which he may be convicted.” Brown, 206 So. 2d at 383.

Aggravated assault is a Schedule 2 permissive lesser included offense of attempted murder depending upon the pleading and the evidence. The elements of aggravated assault, as given to the jury, are 1) the defendant must intentionally and unlawfully, by word or act, threaten to do violence to the victim, 2) the defendant must have the apparent ability to carry out the threat, 3) the act creates a well-founded fear in the victim’s mind that violence is about to take place, and 4) the assault is made with a deadly weapon. (V. 3, p. 62-263); Section 784.08(2)(b), Florida Statutes (1999). The question on direct appeal was whether the language of the information sufficiently alleged the

fourth element of “deadly weapon.” According to the Petitioner, the information alleged a weapon, but not a deadly weapon. However, the language of the information alleged the use of the dog pillow and the stun gun in combination in a manner likely to cause to death. Petitioner’s conviction for aggravated assault was within the allegata of the charging document. The use of the magic words “deadly weapon” would have been redundant in light of the other language.[1]

This is in contrast to State v VonDeck, 607 So. 2d 1388 (Fla. 1992), in which this Court rejected the argument that the element “putting in fear” may be established by inference because a shooting is likely to create such fear. This Court recognized that it is possible to commit an attempted murder without also committing aggravated assault, such as where the victim remains unaware of the attempted murder until some time has elapsed after the commission.

Under this Court’s reasoning in VonDeck, a person can commit murder without using a deadly weapon. For example, a person could try to strangle another person. However, where the information alleges murder or attempted murder and sets forth the weapon which is used to commit the murder, then the

[1]The “with a weapon” language in the information was included as an enhancer, and was the basis for the special verdict form. (V. 3, p. 201).

weapon must be a deadly weapon. Although neither a stun gun nor a pillow is a deadly weapon per se, like a firearm, Judge Harris' concurring opinion correctly points out that the information alleged that they were deadly because they were used in a way likely to kill or create great bodily harm:

> What is the definition of a deadly weapon? It is a weapon which is used or threatened to be used in a way likely to produce death or great bodily harm. In alleging that one has used a weapon or combination of weapons in an attempt to commit second degree murder, would not the inclusion of the adjective "deadly" before "weapon" be redundant?

Nesbitt, 819 So. 2d at 997. The addition of "deadly" to the information would have been surplusage. The information sufficiently alleged the elements of aggravated assault. Therefore, Respondent asks that this Court reverse the Fifth District Court of Appeals holding on this issue, and adopt Judge Harris's analysis.

Alternatively, Respondent asserts that the Fifth District Court of Appeal correctly ruled that Petitioner waived the right to contest the foregoing issue on appeal. The appellate court, relying on Ray v State, 403 So. 2d 956 (Fla. 1981), stated:

> In this case, however, defense counsel expressly agreed that one of the possible lesser included offenses was aggravated

> assault and never raised the issue of the deficiency of the charging document.

Nesbitt, 819 So. 2d at 994. In Ray, this Court held that it was not fundamental error to convict a defendant under an erroneous lesser included charge where he had the opportunity to object and failed to do so if, ”1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action.”

The Ray court discussed the policy issues behind the requirement of an objection to preserve an issue for appellate review, and how that affects the concept of fundamental error. The purpose of a contemporaneous objection is a “practical necessity” that ensures the smooth and efficient operation of the judicial system. It places the trial court on notice that an error may have been committed, and gives it the opportunity to correct it. Id. at 960. However, there are instances where an issue may be raised on appeal despite the lack of a contemporaneous objection- i.e. procedural defects which are so fundamental that the defendant has been denied due process. The Ray court deemed such instances where the interest of justice presents such a compelling demand for application of

this rule "rare." Id. at 960.

There are reasons why a defense counsel may agree (or even request) that the jury be instructed on a lesser included offense despite a deficiency in the charging documents. In State v Espinosa, 686 So. 2d 1345, 1349 (Fla. 1996), this Court eloquently explained, "To hold otherwise would allow a defendant to request an instruction on the lesser included offense in anticipation that the jury will exercise its 'pardon power,' after which the defendant could seek reversal based on the sufficiency of the evidence [or the information]."

In Ray, this Court found that silence by defense counsel was insufficient to constitute waiver under the facts of the case. Presently, defense counsel specifically agreed to the lesser included offense. (V. 3, p. 202-203, 208). Judge Harris's concurring opinion questions whether defense counsel's agreement was sufficient because of the concern that it is based on a lack of awareness of the law and not trial strategy.[2] Respondent submits that a reviewing court must be

[2]Respondent would observe that there was extensive discussion between trial counsel and the court regarding the issue of whether the stun gun was a nonlethal weapon. (V. 2, p. 191-198). This should allay Judge Harris's fears that defense counsel was not aware of this issue. However, the discussion went to whether the State had established that there was sufficient evidence of whether the stun gun was used in a deadly

able to rely on what was said as reflected in the written record, and not second guess defense counsel. In any event, it is presumptive and overly speculative to say that the Petitioner was harmed by an erroneously included lesser offense. Certainly, it is not per se ineffective assistance of counsel. Who is to say that the jury would have acquitted Petitioner had they not been instructed on aggravated assault? It is just as likely that he would have been convicted of the charged crime. Further, the jury may well have exercised the pardon power referred to in Espinosa.

Simply stated, there are strong policy reasons for allowing waiver in such cases as well as requiring a specific on the record objection to a proposed lesser included offense. At the very least, a defendant's oral agreement to a lesser included offense should constitute waiver of any claim that the elements of that claim are not sufficiently pled in the charging document.

Presently, the Fifth District Court of Appeal recognized that the different district courts of appeal apparently

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fashion for purposes of moving for judgment of acquittal, and whether the jury should be instructed on this issue. The conversation did not address whether the information sufficiently alleged that the stun gun and the pillow, used in combination, constituted a deadly weapon for purposes of including aggravated assault as a lesser included offense.

address this issue differently. The Fourth and the Second District Courts of Appeal have held that an error of this type is fundamental in nature, while other case law from the Fifth, Fourth, Third and First have held waiver absent a specific objection.

In Nesbitt, the Fifth District Court of Appeal distinguished those cases out of the Second and Fourth appellate districts which hold that conviction for a lesser offense not within the ambit of the charging document is fundamental error. The court observed that these cases involved bench trials where the trial court found the defendants guilty of lesser offenses not charged by the charging documents:

> Those cases did not present the opportunity to object to the trier of fact's consideration of inappropriate lesser offenses in lieu of the main charge, and opportunity Ray finds to be significant.

Nesbitt, 819 So. 2d at 997, n. 1. The Fifth District Court of Appeal was able to harmonize and/or distinguish the cases which, at first glance, were seemingly in conflict with the other district courts of appeal. Thus, there is not necessarily interdistrict conflict which needs to be reconciled by this Court.

If this Court finds that there is indeed conflict between

the different appellate districts, Respondent submits that the reasoning set forth in Ray and Nesbitt is sound, and should be adopted uniformly by all of Florida's courts.

The First District Court of Appeal has held that the absence of an objection will estop a defendant from raising this issue on appeal. Cherry v State, 389 So. 2d 1201 (Fla. 1st DCA 1980)(The defendant was convicted of the lesser included offense of aggravated assault, but the information did not charge the element of "putting in fear".). The Second District Court of Appeal has held that a deficiency in a charging statement is deemed fundamental, and may be raised at any time. Mateo v State, 757 So. 2d 1229 (Fla. 2d DCA 2000); Velasqez v State, 654 So. 2d 1227 (Fla. 2d DCA 1995). The Third District Court of Appeal has required a specific objection to an instruction on a lesser included offense. Courson v State, 414 So. 2d 207 (Fla. 3d DCA 1982); Henrise v State, 763 So. 2d 393 (Fla. 3d DCA 2000). Finally, the Fourth District Court of Appeal seems to have two contradictory line of cases, one requiring a specific objection (Tolbert v State, 679 So. 2d 816 (Fla. 4th DCA 1996)), and one holding that this is fundamental error which may be raised at any time (Levesque v State, 778 So. 2d 1049 (Fla. 4th DCA 2001)).

Under the logic of the Second District Court of Appeal, a

defendant may never agree to a lesser included offense that is not properly charged in the information. However, if he does agree for whatever reason (strategy, hope for a jury pardon), he is always permitted to raise it on appeal. This is the kind of situation Espinosa seeks to avoid:

> To hold otherwise would allow a defendant to request an instruction on the lesser-included offense in anticipation that the jury will exercise its "pardon power", after which the defendant could seek reversal based on the sufficiency of the evidence [or inadequacy of the information]...Such a holding would allow a defendant to essentially "sandbag" the State while committing a fraud on both the jury and the judge.

Espinosa, 686 So. 2d at 1348. Clearly, the line of cases from the Second District Court of Appeal is at odds with case law stemming from this Court, and should not be adopted.

The next question to be addressed is to what extent the defense must act to waive a deficiency in the charging document as it relates to a lesser included crime. Petitioner submits that if a defendant is given the opportunity to object and does not, he has waived the right to complain on appeal. The trial court must be given the opportunity to correct any error. It is defense counsel's job to be aware of what is charged, and make appropriate objections at that time. At the very least, a trial court must be able to rely on the

representations of the attorneys as to their agreement to jury instructions. Again, it is not per se ineffective assistance of counsel when a defense attorney agrees to an improper lesser included offense. There may be any number of strategic reasons why he might agree to do so, many of which may not be apparent on the face of the appellate record. This Court, as well as the United States Supreme Court, has long warned about second-guessing the strategy of trial counsel. Strickland v Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Clearly, this not rise to the level of per se ineffectiveness which may be addressed on direct appeal. If there is any question of whether such an agreement rendered counsel ineffective, it should be addressed through postconviction mechanisms.

In sum, this Court need not address the issue on which the Fifth District Court of Appeal certified interdistrict conflict. The majority opinion erred in concluding that the allegata of the information exceeded the probata of the conviction. Alternatively, the Petitioner affirmatively agreed to aggravated assault as a lesser included offense of the charged crime. He has waived the right to appeal this issue. If this Court finds interdistrict conflict on this issue, Respondent asks this Court to adopt the Fifth District

Court of Appeal’s analysis.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court deny review of the opinion below. In the alternative, the State seeks affirmance of the Fifth District Court of Appeal's opinion that failure to object to a jury instruction on a lesser included offense waives the right to appeal that issue and reversal on the issue that the information insufficiently alleged the lesser included offense of which Petitioner was convicted.

Respectfully submitted,

RICHARD E. DORAN
ATTORNEY GENERAL

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0931160

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990 (telephone)
(386) 238-4997 (fax)

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been placed in the Public Defender's Box at the Fifth District Court of Appeal this ___ day of November, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL

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RICHARD E. DORAN
ATTORNEY GENERAL

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0931160

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0618550
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, Florida
32118

(386) 238-4990 (telephone)
(386) 238-4997 (fax)

COUNSEL FOR RESPONDENT