IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KELVIN FRANKLIN,

Respondent.

Case No. SC04-1523

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, Respondent, Kelvin Franklin, will be referred to by name, and appellant, State of Florida, will be referred to as State or Petitioner.

The following abbreviations will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

This case, which involved several charges, arose out of a shooting into a vehicle which injured a person not in the vehicle. Count III, involving the injured bystander was submitted to the jury as Attempted Second Degree Murder with a Firearm. The jury over defense objection was instructed on a lesser of Aggravated Battery with a Firearm. The verdict specifically asked for the jury to find that during the commission of the Aggravated Battery with a Firearm that the Respondent discharged a firearm and caused serious bodily injury. The jury found the Respondent guilty of the purportedly lesser included offense and found specifically that a firearm was discharged causing serious bodily injury. Under section 775.087, Florida Statutes (2002), the 10-20-life statute, the jury's findings increased the penalty on aggravated battery, so that it did not carry a lesser penalty than Attempted Second Degree Murder with a firearm.

The defense below objected on two grounds. First of all, that the lesser was not lesser in penalty and therefore not a lesser and secondly, that the Aggravated Battery with a Firearm, was only a permissive lesser and should not have been given in that all the elements were not charged in the information. The Fourth District Court of Appeal agreed with the first argument finding that under these facts aggravated battery was not a lesser offense and reversed for a new trial.

The Respondent requested as a remedy, that upon retrial, he should only be charged with Aggravated Battery without a Firearm. The Fourth District Court of Appeal declined to address that request.

Furthermore, the Respondent argued that insufficient evidence was presented to the jury to support the jury finding of serious bodily injury. The Fourth District Court of Appeal ruled that a photograph of the victim with a round shaped wound on the arm was sufficient.

The State brought forward this appeal to this Court on a motion to certify a question of great public importance:

> WHERE THE EVIDENCE WOULD SUPPORT FINDINGS UNDER SECTION 775.086, FLORIDA STATUTES, THAT RESULT IN THE PENALTY FOR AGGRAVATED BATTERY BEING THE SAME AS FOR ATTEMPTED SECOND DEGREE MURDER, IS AGGRAVATED BATTERY A LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER?

SUMMARY OF THE ARGUMENT

I. Aggravated Battery with a Firearm is not a lesser of Attempted Second Degree Murder with a Firearm, if the jury makes the factual findings that the Mr. Franklin discharged a firearm and caused serious bodily injury. The 10-20-life statute increases the penalty to 25 years to life, which makes the punishment equal to and not lesser than the punishment for Attempted Second Degree Murder with a Firearm.

II. It is fundamental error to instruct a jury on a permissive lesser that includes elements that were not plead in the charging document. The elements of Aggravated Battery were not plead in Count III charging Attempted Second Degree Murder with a Firearm. The lesser should fail for this reason in addition to the previously argued reason.

III. The correct remedy for Mr. Franklin would be to order a new trial on Count III for the next in line necessarily included lesser offense rather than a retrial on Aggravated Battery with a Firearm. Mr. Franklin should get the advantage of the jury finding him guilty of a lesser. The Court should elect the proper lesser for which he should be retried by going down the line of necessarily included proper lessers of Attempted Second Degree Murder with a Firearm.

IV. There was insufficient evidence presented to support the jury finding of serious bodily injury in that the only evidence presented was a photograph of an arm with a circular wound.

ARGUMENT

ISSUE I:

THE FOURTH DISTRICT COURT OF APPEAL HOLDING THAT AGGRAVATED BATTERY WITH A FIREARM IS NOT A LESSER OF ATTEMPTED SECOND DEGREE MURDER WITH A FIREARM WHEN THE JURY HAS MADE FACTUAL FINDINGS THAT A FIREARM WAS DISCHARGED AND CAUSED SERIOUS BODILY INJURY SHOULD BE AFFIRMED

Florida Statute 775.087, the 10-20-life statute, simply put states that if one carries a gun during the commission of certain offenses the penalty is ten years and if one discharges a gun during the commission of certain offenses the penalty is twenty years and if one discharges a gun and as a result of the discharge inflicts great bodily harm or death on a person, the penalty is 25 years to life.

This appeal addresses issues involving Count III of the instant case which went to the jury as Attempted Second Degree Murder with a Firearm. The Court over defense objection, instructed the jury on the lesser of Aggravated Battery with a Firearm. The jury was also asked to make findings as to whether a gun was discharged and whether serious bodily injury occurred. The jury found Mr. Franklin guilty of Aggravated Battery with a Firearm and answered both questions affirmatively. The Respondent argued successfully in front of the 4th DCA that because of the advent of the 10-20-LIFE statute, the alleged "lesser" offense, to wit, aggravated battery as given in Count III was not lesser in penalty, and thus was not a "lesser offense". This is a very simple argument and the case law coming from the United States Supreme Court through the Florida Supreme Court and the District Courts of Appeal are consistent as to this point: A lesser offense by definition is lesser in punishment. Furthermore, instructing a jury on a charge that is not charged and is not a lesser offense is a grave due process violation. Thus, this Court should

answer the certified question negatively. Aggravated Battery under these facts is not a lesser of Attempted Second Degree Murder in that it carries the same penalty.

This Court has stated numerous times that a lesser included offense, by definition carries a lesser penalty. Ray v. State, 403 So.2d 956 (Fla. 1981), State v.Carpenter, 417 So.2d 986 (Fla. 1982), State v. Weller, 590 So. 2d 923 (Fla. 1991). This Court's ruling has been adopted in the *Standard Jury Instructions in Criminal Cases* (97-2), 723 So.2d 123, 124 (Fla. 1998).

As this Court noted in State v. Wimberly, 498 So.2d 929,932 (Fla. 1986), one of the basic underlying policy reasons for instructing juries on lesser included offenses, is to allow for a jury in the proper case to exercise it's "pardon" power. See also State v. Bruns, 429 So.2d 307, 310 (Fla. 1983), State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978) and State v. Baker, 456 So. 2d 419 (Fla. 1984). This "pardon" power is meaningless if the lesser offense is not lesser in punishment. Thus, it clear from all of this Court's rulings and its resulting progeny, a lesser offense must carry a lesser sentence. Thus, the Court should answer the certified question negatively and uphold the 4th DCA's ruling on this issue.

ISSUE II:

THE VERDICT SPECIFICALLY FINDING SERIOUS BODILY INJURY WAS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE

This Court has the discretionary authority to consider issues other than those upon which jurisdiction is based when the other issues have been properly briefed and argued, and are dispositive of the case. Savoie v. State, 422 So. 2d 308 (Fla. 1982). On sufficiency of the evidence arguments, this Court has de novo review. Sigler v. State, 805 So.2d 32 (Fla. 4th DCA 2002).

Another important issue was argued, briefed and ultimately ruled upon by the 4th DCA. This issue was wrongly decided and this Court should correct the record and case law. Florida Statute 775.087(2) 3 which outlines the proof required to sentence someone automatically to a minimum mandatory 25 years to life requires that as a result of the gun's discharge, death or great bodily harm was inflicted. This is a huge sentence in that people are vulnerable to a minimum of 25 years with no parole or gain time and a maximum of life. As an illustration of how serious this sentence is, this used to be the "life" sentence in capital cases, this was the sentence for First Degree Murder when the death penalty was not imposed. In order for the State to prosecute people and put them away under this statute, the State should have to prove a certain modicum of evidence that shows a crime has been committed that deserves such drastic consequences. In the instant case, the only evidence presented was a photograph of a round scar on the girl's arm. The 4th DCA stated that this would not be consistent with slight grazing, as follows:

> Appellant also argues that there is no competent substantial evidence to support the jury finding of serious bodily injury under section 775.087(2)(a)3, Florida Statutes. The essence of his argument is that not all bullet wounds are necessarily serious, giving the example of a slight grazing; however, the photograph of the victim in this case reflects a round

> scar in an area which would not be consistent with slight grazing. This was sufficient to support the find of serious bodily injury.

A careful examination of the 4th DCA ruling on this issue reveals that the 4th DCA has erred in a fundamental way. The 4th DCA has inserted itself into the fact finding process which goes against all tenets of appellate law. Judge Klein writing for the Court is not an expert on examining photographs and from the photographs concluding what type of injury the victim sustained. What qualifies Judge Klein to make this conclusion that a round wound can not be a grazing. Arms are not flat, rather they have curved areas. Logic and mathematical tenets support the notion that a bullet passing by an arm could in fact create a round wound. The argument made by the defense below was that any contact between a bullet and a person is not "serious bodily injury" and that the State should be required to put on more evidence to support their prosecution than a photograph. The inference from the roundness that Judge Klein seems to be making is that this picture depicts the entry wound of a bullet into this girls arm. Yet there is not one other shred of evidence to support this.

The presentation of a photograph showing a round scar with nothing more does not meet the burden for proving serious bodily injury under the 10-20-Life statute. This Court needs to address this issue to correct the record and case law on this issue. Either the Court needs to provide a definition for "serious bodily injury" that will assist future courts on this issue, or, at a bare minimum, the Court needs to state that proof consisting of a photograph of a round scar is not enough. We all have learned about "bad law" in law school and this Court more than any other in the State of Florida is aware of the consequences bad case law can create. In the interests of not just the Respondent, Mr. Franklin, but also in the interests of other citizens accused in the future under the 10-20-life statute, the Court should not let this issue stand, but rather needs to address this issue and correct the record and case law.

The defense would suggest looking to the definition of "serious bodily injury" given in Chapter 316.1933 defining circumstances after an automobile accident where law enforcement can force a suspect to take a blood test. Certainly, a comparison of the consequences, i.e. when the State can force someone to take a blood test versus when the State can lock someone up for life, seems to indicate that this should be the minimum burden that the State should have to meet. In this statute, "serious bodily injury" is defined as "an injury to any person, including the driver, which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss of impairment of the function of any bodily member or organ."

In the instant case, the State failed to put on any medical testimony and failed to inquire of any of its witnesses in regards to the details of this injury. Getting shot sounds bad, but it really is a general term for any contact between the body and a bullet. This could include grazing, a surface wound or a life threatening wound. A photograph of the injury does not inform the fact finder as to the extent of the injury. If that is all that is required to qualify for 25 years to life, then why did the legislature specify that "death or great bodily harm" must be proven. There was no testimony that the injury itself was life threatening.

When a verdict is not supported by evidence, the Court should set the verdict aside. "The trial judge sits as the seventh juror with a veto over the unanimous vote of the other six." State v.Smyly, 646 So. 2d 238 (Fla. 4th DCA, 1994). In the instant case, the defense filed a Motion for New Trial arguing that the verdict was not supported by the evidence. Although, a written or verbal order denying the motion is not apparent in the record, it is clear that the Court denied this motion. An objective review of the record reveals no evidence of serious bodily injury and thus the jury's finding that there was serious bodily injury is not based on evidence but rather emotion. This is totally understandable in a case with

these facts. However, that is why the Court has the authority to order a new trial when the evidence is legally insufficient. The trial Court's failure to do so is error that this Court should correct.

ISSUE III

THE PROPER REMEDY AFTER A CONVICTION OF A LESSER HAS BEEN STRUCK IS TO ORDER A RETRIAL ON THE NEXT IN LINE LESSER OF THE ORIGINAL CRIME CHARGED

The Fourth District Court of Appeal reversed the conviction on Count III for a new trial. The Court noted as follows in its ruling:

> Appellant states that on retrial he should be charged only with aggravated battery without a firearm, but he has given us no theory or authority to support that statement, and we accordingly decline to address that issue.

The argument that was not clear to the 4th District Court of Appeal is simply put a rational argument. As to Count III, the jury found Mr. Franklin guilty of a charge that they were told was a lesser charge. A jury has heard the evidence and has ruled and their ruling is entitled to respect and deference. Because the charge of Aggravated Battery with a Firearm fails as a lesser, the Court should go to the next lesser in line, that is Aggravated Battery without a Firearm. Mr. Franklin should be retried on the next legal lesser of the original crime charged. This follows the jury's ruling and is fair to Mr. Franklin and the principles of double jeopardy. This argument was articulated by Judge Hubbart's opinion in part concurring and in part dissenting with the majority opinion in Jones v. State, 492 So. 2d 1124 (Fla. 3rd DCA 1986) in which he argues that the Court should have struck the lesser charge and ordered a retrial on the highest level lesser of the crime for which the defendant was originally charged -- inasmuch as the defendant was impliedly acquitted by the jury at the first trial as to the original charge. Judge Hubbart noted that it would be improper to retry Mr. Jones on the improper lesser for which he was convicted. This is also the remedy followed in Nurse v. State, 658 So. 2d 1074 (Fla. 3rd DCA 1995) where the defendant was found guilty of the improper lesser of Attempted Burglary of an Unoccupied Dwelling, the

Court remanded the case for a retrial on simple trespass. This Court has the authority to address this issue and impose the proper remedy upon the prosecution.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Mr. Franklin respectfully requests this Honorable Court to answer the certified question in the negative and to correct the record and case law by at a minimum striking the 4th DCA finding of sufficient evidence as to serious bodily injury or more fully by articulating a definition for serious bodily injury. Furthermore, Mr. Franklin requests that the proper remedy be articulated as to his retrial on Count III, that is, after striking the lesser offense of Aggravated Battery with a Firearm, his retrial should be on the next in line lesser included offense of the original crime charged, Aggravated Battery without a Firearm.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, FL 33401, this 5th day of January, 2005.

CERTIFICATE OF FONT

I hereby certify that this brief complies with the font requirement of Fla. R. App. P. 9.210(a) 2. The brief has been formatted in Times New Roman, 14 point font.

Respectfully submitted,

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