

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC No.: SC07-573

L.T. No.: 2D05-2882

CHARLES KETTELL,

Respondent.

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ON PETITION FOR REVIEW FROM  
THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

REPLY BRIEF OF PETITIONER

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**STATEMENT OF THE CASE AND FACTS**

Petitioner will rely on the statement of the case and facts as set forth in its initial merits brief.

## **SUMMARY OF THE ARGUMENT**

In addition to the argument set forth in its initial brief, based upon the totality of the evidence in this case, if any error occurred in the instruction as given, the error was harmless.

## ARGUMENT

BASED UPON THE EVIDENCE PRESENTED AND THE CONDUCT OF RESPONDENT'S TRIAL COUNSEL DURING REBUTTAL CLOSING, THE INSTRUCTION, AS MODIFIED, WAS PROPER. IF ERROR, IT WAS HARMLESS.

As the dissent indicated below:

The police found four .38 caliber bullet holes in the floor boards of the apartment. Additionally, the police discovered a 9 ½ wooden dowel, gun-cleaning brushes, a leather holster, a bottle of powder solvent, and a pouch of ammunition. Fortunately, no one was hurt. Apparently, Mr. Kettell was not shooting at anyone. Our record does not suggest, however, that he fired the shots accidentally.

The multiple gunshots fired by the Respondent could not have been accidental since, as the record shows, the pistol used was a six shot single action replica black powder revolver, requiring the hammer to be pulled back before the trigger is pressed, in order for the gun to discharge. (Record VII, at p. 195)

Nothing in this record establishes any factual basis for showing that the shots were fired in any way but intentionally, satisfying the statutory requirement of intent.

"Wantonly" means consciously and intentionally, with reckless indifference to consequences and with the knowledge that damage is likely to be done to some person.

"Maliciously" means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person.

Based upon the totality of the record, this jury could not have been confused by the jury instruction that the trial court gave to repair the misstatement of the law that Respondent's counsel had committed on the rebuttal closing.

Respondent submits that the trial court could have done a number of things with the instruction to correct the law as stated by counsel; however, the question is not what could have been done, but what affect the choice made by the trial court had on the deliberations of the jury.

And third, even if the instruction had been given in error, it would be harmless beyond a reasonable doubt, given the evidence of guilt in this case. See Consalvo v. State, 697 So. 2d 805 (Fla. 1996)(jury instruction on unexplained possession of recently stolen property was properly given; error, if any, was harmless).

Riggins v. State, 898 So. 2d 1025, 1026 (Fla. 4<sup>th</sup> DCA 2005)

Petitioner reiterates that based upon the facts of this case, the instruction as given did, read as a whole, properly advise the jury of the elements of the crime and were not contradictory, confusing, or misleading. See Willcox v. State, 258 So. 2d 298, 300 (Fla. 2d DCA 1972); Diez v. State, 359 So. 2d 55, 56 (Fla. 3d DCA 1978).

**CONCLUSION**

In light of the foregoing facts, arguments, and authorities, Petitioner respectfully requests this Honorable Court exercise its discretionary jurisdiction under Art. V, Section 3(b)(3), Fla. Const. to resolve the conflict outlined above.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a true and correct copy of the foregoing Reply Brief of Petitioner has been furnished by U.S. mail to Bruce P. Taylor, Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831-9000 this 29<sup>th</sup> day of August 2007.

**COUNSEL FOR PETITIONER**

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY 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).

**COUNSEL FOR PETITIONER**