

0/a 6-5-86

IN THE SUPREME COURT OF FLORIDA

ERINEO ACENSIO,  
Petitioner,  
v.  
STATE OF FLORIDA,  
Respondent.

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CASE NO. 67,888

DISCRETIONARY REVIEW OF DECISION  
OF THE DISTRICT COURT OF APPEAL,  
SECOND DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This supplemental brief is filed on behalf of the STATE OF FLORIDA pursuant to this Court's order at oral argument.

ERINEO ACENSIO will be referred to as the "Petitioner" in this case, and the STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal consists of three volumes and will be referred to by the symbol "R" followed by the appropriate page number.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Supplemental Statement of the Case and Facts subject to changes and additions noted in the argument.

SUMMARY OF THE ARGUMENT

There was no error in the trial court's refusal to give the battery instruction because battery is a separate offense from attempted first-degree murder with a firearm.

Alternatively, there was no error because there was no evidence to support an offense of battery. The only evidence in this case was that Petitioner committed the act with a firearm. There being no dispute as to this element, an instruction on battery was inappropriate.

Petitioner received a benefit because the jury was instructed on aggravated battery as a lesser-included offense, when, in fact, aggravated battery is a separate offense. The schedule should be revised in accordance with Section 775.021(4). Further, there should be no jury instructions given for lesser-included offenses for which there is no evidence.

ARGUMENT

WHETHER THE TRIAL COURT ERRED  
BY REFUSING TO INSTRUCT THE  
JURY ON THE OFFENSE OF BATTERY.

Petitioner was charged with attempted first-degree murder.

The information charged that Petitioner

from a premeditated design to effect the death of a human being, and devising and intending to kill a human being, unlawfully did attempt to kill a human being, to-wit, Alec Carmichael by shooting the said Alec Carmichael and during the commission of said felony the said ERINEO ACENSIO used a firearm, to-wit, a pistol, in violation of Sections 782.04 and 777.04 and 775.087, Florida Statutes... .

The trial court gave jury instructions on the following offenses: attempted first-degree murder with a firearm, a life felony under §§782.04(1), 777.04(4)(a) and 775.087(1)(a), Fla. Stats. (1985); attempted second-degree murder with a firearm, a first-degree felony under §§782.04(2), 777.04(4)(b) and 775.087(1)(b), Fla. Stats. (1985); attempted manslaughter with a firearm, a second-degree felony under §§782.07, 777.04(4)(c) and 775.087(1)(c), Fla. Stats. (1985); and aggravated battery, a second-degree felony under §784.045, Fla. Stat. (1985).<sup>1</sup>

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<sup>1</sup>/The trial judge initially instructed the jury as to the elements of attempted first-degree murder, attempted second-degree murder and attempted manslaughter without reference to the use of a firearm. However, the jury was instructed on the maximum penalties for commission of these offenses with a firearm, and the verdict forms read to the jury referred to a firearm. For those reasons, Respondent agrees that this Court should determine this issue using the jury instructions for commission of the offenses with a firearm.

Petitioner's trial counsel also requested that the trial court give a jury instruction on battery, which is a first-degree misdemeanor. §784.03, Fla. Stat. (1985). The trial court refused to give the instruction because the court was of the opinion that battery was "too far down the line" (R. 219). Petitioner contends that battery is a lesser-included offense of attempted first-degree murder and that the failure to give the battery instruction was per se reversible error. For the reasons stated below, that argument is without merit.

Battery is not a lesser-included offense of attempted first-degree murder, but rather a separate offense.<sup>2</sup> Therefore, the trial court's refusal to give the battery instruction was not error.

"Offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." §775.021 (4), Fla. Stat. (1985); State v. Gibson, 452 So.2d 553 (Fla. 1984); Scott v. State, 453 So.2d 798 (Fla.1984); State v. Baker, 456 So.2d 419 (Fla.1984).

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<sup>2</sup>/In its opinion in this case, the Second District Court of Appeal stated "[f]or the purpose of this opinion, and based on the facts of this case, it is conceded that battery is a lesser-included offense of attempted first-degree murder as charged in the information and as proven at trial." Acensio v. State, 477 So.2d 38 (Fla. 2d DCA 1985). The facts Petitioner now presents this Court are, however, significantly different than the facts presented by Petitioner to the Second District Court of Appeal.

The elements of battery include either (1) the actual or intentional striking or touching, of another person, against the will of the other person; or (2) intentionally causing bodily harm to an individual. §784.03(1), Fla. Stat. (1985). The elements of attempted first-degree murder with a firearm are the attempt, to commit an unlawful, killing, of a human being, when perpetrated from a premediated design to effect the death of the person killed or any human being, using a firearm. §782.04(1)(a)1, 774.04(1) and 775.087, Fla. Stats. (1985).

In State v. Boivin, 11 F.L.W. 123 (Fla. March 27, 1986), this Court determined, after reviewing the statutory elements of aggravated battery and attempted first-degree murder, that each of these offenses requires proof of at least one fact which the other does not. Similarly, the offenses of battery and attempted first-degree murder with a firearm each require proof of an element that the other does not. Thus, one can commit a battery without committing attempted first-degree murder with a firearm, and vice versa.

Accordingly, because battery is a separate offense from attempted first-degree murder, as opposed to a lesser-included offense of that crime, the trial court's refusal to give the battery instruction was not error.

Respondent recognizes that in State v. Boivin, supra, this Court found no legislative intent to impose multiple punishments for both aggravated battery and attempted first-degree murder where both the aggravated battery and the attempted murder caused no additional injury to another person

or property. The question whether multiple punishments may be imposed for separate offenses is distinct from the question whether two offenses are, in fact, separate. Furthermore, Respondent would respectfully submit that that particular determination is contrary to numerous other decisions of this Court. See, State v. Gibson, 452 So.2d at 557 ("[s]ection 775.021(4)...mandates separate prosecutions and punishments whenever an act or group or series of acts violates more than one statutory provision.") and State v. Henriquez, 485 So.2d 414, 415-416 (Fla.1986) ("[w]here, based on their statutory elements, offenses are separate and distinct, the intent of the legislature clearly is to provide for separate convictions and punishments."). See also, Ball v. United States, 470 U.S. \_\_\_, 106 S.Ct. \_\_\_, 84 L.Ed.2d 740 (1985).

Alternatively, should this Court determine that battery is a lesser-included offense of attempted first-degree murder with a firearm, there is still no error in the trial court's refusal to give the battery charge because there was no evidence to support such a charge.<sup>3</sup>

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<sup>3</sup>/Respondent submits that this case must be considered in conjunction with State v. Wimberly, Case No. 67,847, which is currently pending before this Court. In that case, the State of Florida urges that Rule 3.510(b) of the Florida Rules of Criminal Procedure be read as not requiring an instruction on a necessarily lesser-included offense where there is no evidence to support such an offense. A ruling in favor of the State in that case would necessarily dictate a ruling favorable to the State on this issue in the instant case.

Rule 3.510 of the Florida Rules of Criminal Procedure provides, in pertinent part:

Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:

. . .

(b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

In Sansone v. United States, 380 U.S. 343, 349-50, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965), the United States Supreme Court stated:

a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.

(citations omitted).

This Court has also held that where a lesser-included offense is not supported by the evidence, no jury instruction should be given. In Gilford v. State, 313 So.2d 729 (Fla. 1975), the petitioners were charged with breaking and entering with intent to commit a felony, to wit: grand larceny.

The petitioner's requested instruction on breaking and entering with intent to commit a misdemeanor, to-wit: petit larceny, was refused. This Court found that the only evidence in that case was that the value of the property was \$600. Therefore, because the value of the property, which is only element which distinguishes grand larceny from petit larceny, was not disputed, this Court held the petit larceny instruction was appropriately denied. Id. at 732.

Similarly, in State v. Paffy, 369 So.2d 340 (Fla.1979), this Court held that in cases where two crimes are distinguished by the value of the property involved, and the value of the property is not disputed, proof of the greater amount does not constitute proof of the lesser amount. Therefore, a jury instruction on the lesser offense should not be given. Id. at 342.

In the instant case, Petitioner's trial counsel sought an instruction on simple battery. The only element which distinguishes battery from the greater offenses for which jury instructions were given was whether Petitioner used a firearm. There was, however, no dispute that Petitioner used a firearm. In fact, Petitioner's sole defense was that he shot in self-defense. Thus, a conviction for simple battery in this case would have been totally against the evidence. The request for a battery instruction was, therefore, appropriately denied.

The trial judge's refusal to give the battery instruction did not interfere with the jury's pardon power. A jury

can always exercise its pardon power by deciding to acquit the defendant. See, Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

Furthermore, in this case, Petitioner actually received a jury pardon benefit to which he was not entitled because the jury was given an instruction for aggravated battery as a lesser-included offense when, in fact, that offense is a separate offense. This was due to the trial court's reliance on the incorrect schedule of lesser-included offenses. As Justice Shaw recognized in his concurring opinion in Green v. State, 475 So.2d 235, 237-39 (Fla.1985), Section 775.021(4) has effectively nullified the category two (permissive) lesser-included offense schedule. The schedule should be revised in accordance with Section 775.021(4). Moreover, this Court should construe Rules 3.490 and 3.510 of the Florida Rules of Criminal Procedure as precluding the giving of a jury instruction on a lesser-included offense for which there is no evidence.

CONCLUSION

Based on the foregoing reasons, argument and authorities, Petitioner's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Appellate Division, Hall of Justice Building, 455 North Bradway, P. O. Box 1640, Bartow, FL 33830-3798 this 20 day of June, 1986.

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