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Criminal Law: Instructions to the Jury on Lesser Degree and Lesser Included Offenses

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CRIMINAL LAW: INSTRUCTIONS TO THE JURY ON LESSER DEGREES AND LESSER INCLUDED OFFENSES

Brown v. State, 206 So. 2d 377 (Fla. 1968)

Petitioner was charged with robbery and convicted on the basis of evidence that he forced a grocery store cashier to give him money at gunpoint.[1] After the evidence was presented, petitioner's attorney requested a verdict form for larceny, but the trial judge refused on the ground that no evidence supported a conviction for larceny. An objection was registered and on appeal the First District Court of Appeal affirmed.[2] The Florida supreme court granted certiorari and HELD, defendant was entitled by statute[3] to a jury instruction on larceny regardless of the trial judge's decision that the proofs supported a robbery conviction.[4] The decision of the district court was quashed and the case remanded.

The decision in the instant case is not distinguished by its application to the petitioner, but by the opportunity it afforded the Florida supreme court to eliminate a source of confusion, which has plagued the criminal law in Florida. In recognition of this need the court prefaced its decision with the statement: "Recent months have presented to our appellate courts a rash of lesser included offense situations. Our own consideration of the cases which have reached us, suggests the advisability of . . . a definitive statement of applicable rules for the guidance of Florida courts."[5] The court went beyond the present facts to lay down specific guidelines for jury instructions in criminal cases for all offenses other than those specifically charged in the indictment or information. The court felt the matter was controlled by Florida Statutes, sections 919.14[6] and 919.16[7]. According to the court, these statutes suggest four categories of offenses that were dealt with in the decision: crimes divisible into degrees, attempts to commit offenses, offenses necessarily included in the offense charged, and offenses that may or may not be included in the offense charged.[8] The statutes clearly provide that "the jurors *may*" convict a defendant of a lesser degree or lesser included

1. 206 So. 2d 377, 379 (Fla. 1968).
2. 191 So. 2d 296 (1st D.C.A. Fla. 1966).
3. FLA. STAT. §919.16 (1967).
4. 206 So. 2d 377, 384 (Fla. 1968).
5. *Id.* at 380.
6. FLA. STAT. §919.14 (1967). *"Determination of degree of offense.* If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."
7. FLA. STAT. §919.16 (1967). *"Conviction of attempt; conviction of included offense.* Upon an indictment or information for any offense the jurors may convict the defendant of an attempt to commit such offense, if such attempt is an offense, or convict him of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard." (Substantially similar to FLA. R. CRIM. P. 1.510).
8. 206 So. 2d 377, 381 (Fla. 1968), *construing* FLA. STAT. §§919.14, 919.16 (1967).

offense[9] and that province of the jury is supported by Florida case law.[10] The confusion in Florida courts did not arise over the question of the jury's power to decide where the defendant stood along the spectrum of offenses covered by the indictment or information. Rather, the problem centers on the trial judge's capacity to limit, on the basis of the evidence adduced, that portion of the spectrum of offenses from which the jury may make its decision. According to those who would afford the trial judge this discretion, it is analogous to the capacity of the judge in civil cases to direct a verdict or render summary judgment.[11] The opponents of this view rely upon a strict interpretation of the statutory provisions governing the area.[12] The decision in the instant case ends the confusion that resulted from the simultaneous coexistence of both views in the Florida courts.

The Florida supreme court considered each category of offense separately. In crimes divisible into degrees[13] the court held that the trial judge *must* instruct on *all* degrees of the offense less than that degree charged.[14] The court cited *Killen v. State*,[15] wherein it recognized that Florida Statutes, section 919.14, affirms the rule that if the evidence supports a higher degree, a conviction of a lesser degree need not be supported by the evidence. The instruction is mandatory contingent only upon a request for it by the attorney.[16] No discretion on the part of the trial judge is allowed.

Second, in the case of attempts to commit offenses[17] the trial judge is given the power to decide as a matter of law whether an attempt to commit the offense charged is a crime itself. After making that finding, however, the judge is not given the power to decide as a matter of law whether the proofs support an instruction on attmpt.[18] The Florida supreme court bases this decision on the strict interpretation of Florida Statutes, section 919.16.[19]

Third, the latter aspect of the "attempts" decision also extends to offenses necessarily included within the offense charged. In that category the court held that under section 919.16[20] "any offense which is necessarily included in the offense charged" requires an instruction to the jury.[21] According to the court, every robbery *necessarily* includes a larceny. In order for the evidence to prove the robbery, larceny must also be proved simply because it

9. FLA. STAT. §§919.14, .16 (1967) (emphasis added).

10. *See* Nelson v. State, 83 So. 2d 687 (Fla. 1955); Jimenez v. State, 30 So. 2d 292, 295 (Fla. 1947); Blanco v. State, 150 Fla. 98, 7 So. 2d 333 (1942); Ammons v. State, 88 Fla. 444, 102 So. 642, 644 (1924).

11. Griffin v. State, 202 So. 2d 602, 603 (1st D.C.A. Fla. 1967).

12. Brown v. State, 206 So. 2d 377, 382 (Fla. 1968). *See also* Hand v. State, 199 So. 2d 100, 102 (Fla. 1967).

13. FLA. STAT. §§782.04 ,.06 (1967) (homicide); FLA. STAT. §§806.01-.04 (1967) (arson).

14. Brown v. State, 206 So. 2d 377, 381 (Fla. 1968).

15. 92 So. 2d 825, 828 (Fla. 1957). *See also* Brown v. State, 124 So.2d 481, 483 (Fla. 1960).

16. Brown v. State, 124 So. 2d 481, 483 (Fla. 1960).

17. Most attempts are offenses pursuant to FLA. STAT. §776.04 (1967).

18. Brown v. State, 206 So. 2d 377, 381 (Fla. 1968).

19. FLA. STAT. §919.16 (1967).

20. *Id.*

21. Brown v. State, 206 So. 2d 377, 381 (Fla. 1968).

is an essential element of robbery.[22] In this category as well as the "attempts" category the trial judge is given no discretion in choosing whether to instruct the jury after a timely request from the attorney.

Only in the fourth category is the trial judge empowered by the Florida supreme court to withhold an instruction based on the evidence adduced at trial. Here the court was concerned with offenses that *may* be included in the offense charged depending upon the circumstances.[23] The trial judge must decide if the accusatory pleadings and the evidence support a possible conviction of the offense, which may be included, and instruct or not as the case warrants.[24]

Thus the supreme court's present decision gives the trial judge, according to the category of offense, anything from full discretion to no discretion in instructing the jury on lesser offenses.[25] In the first and fourth categories the nature of the offense is in harmony with the court's decision on the trial judge's capacity. In the other two — the "attempts" and "necessarily included offenses" categories — a closer look at the opposing views is in order. Out of the confusion in recent cases in this area two theories emerge. One view is that taken by the Florida supreme court and which is generally expressed by the present decision. This view is also supported by previous cases, which have taken the position that the degree of guilt or possibility of a lesser offense conviction lies only with the jury.[26] The feeling seems to be that the decision whether instructions should be given should not depend on the trial judge's view of the evidence, and that if the judge does withhold instructions he is usurping an important evidentiary function from the jury.[27] In *Hand v. State*[28] the court made its most forceful argument prior to the present decision. In *Hand* the court noted that section 919.16 clearly states "the court shall charge the jury in this regard"[29] and added that an instruction on the lesser offenses could not burden the prosecution's case and would save the time and expense, which new indictments for lesser offenses might involve.[30]

The opposing view centers around the evidence adduced at trial and whether it will support an instruction on the offense in question. In the instant case, for example, the use of a deadly weapon and force, violence, or fear was proved by the evidence.[31] The issue then becomes whether there remains any question of fact for the jury or whether the lesser offense of

22. *Id.* at 382. *See also* Arnold v. State, 83 So. 2d 105, 108 (Fla. 1955); Williams v. Mayo, 126 Fla. 871, 172 So. 86, 88 (1937).

23. Brown v. State, 206 So. 2d 377, 383 (Fla. 1968). Assault with intent to commit robbery may or may not include aggravated assault depending upon whether a deadly weapon was used.

24. *Id.*

25. *See generally id.*

26. Brown v. State, 124 So. 2d 481, 483 (Fla. 1960); Killen v. State, 92 So. 2d 825 (Fla. 1957).

27. Hand v. State, 199 So. 2d 100, 102 (Fla. 1967).

28. *Id.* at 102.

29. *Id.* at 102.

30. *Id.* at 103.

31. 206 So. 2d 377, 379 (Fla. 1968).

larceny is precluded as a matter of law by the evidence, which proves *only* robbery. Who should decide the question? According to the advocates of trial judge discretion, no instruction should be given unless the offense is supported by the record – that is, unless the evidence is reasonably susceptible of the conclusion that the offense was committed.[32] California has expressed what appears to be the best view of this evidentiary problem. In a recent case three general situations were considered to affect the judge's duty to instruct on lesser included offenses:[33]

> First, where there is evidence which could absolve the defendant from guilt of the greater offense but would support a finding of guilt of the lesser offense, the instruction is mandatory. Second, where the evidence would not support a finding of guilt of the lesser offense – for example, where the defendant denies complicity or the elements of the offense differ – the instruction is not only unnecessary but is erroneous because not pertinent. There is a third or intermediate situation where proof of the greater offense necessarily includes every element of the lesser offense; in which situation the instruction is proper but not mandatory and, even if requested, it is not error to refuse it if the evidence shows guilt above the lesser offense.

Florida supreme court cases before the present case were also concerned with this problem of evidentiary support,[34] and the supreme court has even recently decided the question in favor of the California view by citing as authority the very case that it now overturns:[35] "We choose the view expressed in *Brown*. We think two factors should be considered in respect of charges on lesser included offenses. One is the appropriateness or inappropriateness of such a charge to the established facts. . . ."[36] Since the *Hand* decision,[37] the First District Court of Appeal has reluctantly followed the Florida supreme court's reversal of position, though stating each time that it is based on false reasoning and flies in the face of the "universally accepted proposition of law that instructions to the jury must be based upon the evidence . . . and if unsupported by . . . the evidence . . . can have no effect other than to create confusion and mislead the jury. . . ."[38] Alabama[39] and North Carolina,[40] among many others,[41] advocate trial judge discretion in determin-

32. Toler v. State, 193 So. 2d 651, 652-53 (1st D.C.A. Fla. 1967); Little v. State, 192 So. 2d 793, 794 (1st D.C.A. Fla. 1966); Silver v. State, 174 So. 2d 91, 95 (1st D.C.A. Fla. 1965).

33. People v. Garcia, 250 Cal. App. 2d 15, 17-18, 58 Cal. Rptr. 186, 188 (1967). *See also* People v. Byron, 91 Cal. App. 189, 266 P. 972, 974 (1928).

34. McClendon v. State, 196 So. 2d 905, 910 (Fla. 1967); Goswick v. State, 143 So. 2d 817, 819 (Fla. 1962).

35. Flagler v. State, 198 So. 2d 313, 314 (Fla. 1967): "[T]he contention of the petitioner may well be concluded on authority of an excellent opinion by the District Court of Appeal, First District, in the case of *Brown v. State* . . . ."

36. *Id.* at 315.

37. 199 So. 2d 100 (Fla. 1967).

38. Griffin v. State, 202 So. 2d 602, 603 (1st D.C.A. Fla. 1967). *See also* Adams v. State, 201 So. 2d 494 (1st D.C.A. Fla. 1967).

39. Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937).

40. State v. Lentz, 270 N.C. 122, 153 S.E.2d 864, 868 (1967). *See also* State v. Bell, 228 N.C. 659, 46 S.E.2d 834, 837-38 (1948).

41. Annot., 58 A.L.R.2d 808 (1958).

ing whether evidentiary support indicates the need for lesser included offense instructions.

An analysis of both views shows each to be supported by various policy considerations. The supreme court's present decision allows a jury to convict of a lesser offense *regardless* of the proof, and we may only speculate about the myriad considerations that might influence them to do so. When the legislature prescribes the elements of, and the penalty for, an offense such as robbery, should the jury have power to defeat the legislative purpose by finding a defendant guilty of a lesser offense that the proof does not support —an attempt or larceny? The federal courts, while recognizing the jury's mercy-dispensing function, have held that this role of the jury cannot stand alone as a sufficient basis for an instruction on lesser included offenses.[42] Thus, the federal courts join those who recognize the need for evidentiary support.[43] A member of the California bar has gone so far as to say that it is wrong to instruct on *all* lesser included offenses *supported* by the evidence if public policy dictates otherwise and when no prejudice to the defendant will result.[44] This view was well stated in an article based mainly upon Canadian decisions: "A trial judge is not obliged to direct the jury . . . with respect to included offenses in every case, but only where there is in the evidence a foundation of fact that on which a reasonable jury, properly instructed, could bring in a finding of the included offense."[45]

Florida courts have wrestled with the problem to the point of confusion. Appeals have been taken both when instructions were refused[46] and when they were given,[47] and the case law on the point is inextricably tangled. It was obvious that some standard procedure was needed. In that regard the present decision is admirable, simple of administration, and well-timed. However, in view of the previous reasoning concerning this point of law, and statements by the Florida supreme court,[48] it appears that the present decision may call for a reevaluation of certain offenses to determine if they are in fact *necessarily included* within more serious offenses. Perhaps a reevaluation of the criminal trial judge's role is also demanded if the present decision stands. The judge may control the evidence that reaches the jury. Is he now forced to instruct them on offenses inconsistent with that evidence? The present decision decides the procedure, but does not decide the controversy.

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42. Kelly v. United States, 370 F.2d 227, 229 (D.C. Cir. 1966).

43. Hanks v. United States, 388 F.2d 171, 175 (10th Cir. 1968); Green v. United States, 383 F.2d 199, 202 (D.C. Cir. 1967).

44. McKissack, *Recent Developments in the Criminal Law: The Included Offense Doctrine in California*, 10 U.C.L.A.L. REV. 870, 907-08 (1963).

45. Gloin, *Included Offenses*, 4 CRIM. L.Q. 160, 161-62 (1961).

46. Brown v. State, 191 So. 2d 296 (1st D.C.A. Fla. 1966).

47. Jiminez v. State, 158 Fla. 719, 30 So. 2d 292 (1947).

48. "There can be no robbery without violence, and there can be no larceny with it." *E.g.*, Montsdoca v. State, 84 Fla. 82, 93 So. 157, 159 (1922).