IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, FLORIDA

FRANKIE HAYES

Appellant,

Case No.: 5D17-4061
L.T. No.: 2016-CF-010393

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

On Appeal from the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida

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PUBLIC DEFENDER

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INTRODUCTION

The trial court reversibly erred by failing to instruct the jury on lesser included offenses clearly requested by Appellant and supported by both the charging document and evidence at trial. Both count one and count two arose from the same set of facts. The trial court's reasoning in denying Appellant's request for lesser included offenses on count one was based on double jeopardy concerns, which have no bearing on whether the instructions should be given. The trial court invaded the province of the jury with the denial of this request. This Court should reverse and remand for a new trial on both counts.

PRELIMINARY STATEMENT

Appellant, FRANKIE HAYES, the defendant in the trial court and Appellant before this Court, will be referenced in this brief as "Ms. Hayes" or "Appellant." Appellee, State of Florida, the prosecution authority in the trial court, and Appellee before this Court, will be referenced herein as "the State" or "Appellant." References to the record on appeal will be designated by "R." followed by the relevant page number. References to the trial transcript will be designated by "T." followed by the relevant page number. The record consists of 230 pages and the trial transcript consists of 722 pages.

STATEMENT OF THE CASE AND FACTS

A. Charging Document

The State charged Ms. Hayes by information with three counts. R. 38-40. In count one, the State alleged Ms. Hayes was guilty of attempted first degree premediated murder in violation of section 782.02(1)(a), Florida Statutes. R. 38. In Count Two, the State alleged Mr. Hayes was guilty of aggravated battery with a firearm in violation of section 784.045(1)(a)(2), Florida Statutes. R. 39. In the charging document for both count one and two the State alleged the facts that supported both offenses occurred on August 6, 2016, when Ms. Hayes allegedly possessed and discharged a firearm striking Ms. Latoya Brothers causing her great bodily harm. R. 38-39. In count three, the State alleged Mr. Hayes was guilty of providing false information to a law enforcement officer during an investigation, in violation of section 837.055, Florida Statutes. R. 40. Prior to trial, the State dropped count three. R. 173.

B. Witness Testimony

At trial there was a dispute between the parties as to whether Ms. Hayes was the individual who shot and injured Ms. Brothers. T. 221-544. However, the basic facts as alleged and testified to by the State's witnesses were that Ms. Hayes discharged a firearm and the projectile from that firearm struck Ms. Brother's arm

causing her great bodily injury when it impacted her forearm. T.221-544. These facts were the basis for count one and count two. T. 552-555; R. 219-225.

C. Jury Instruction Request and Denial

Prior to closing arguments, the trial court and the parties discussed jury instructions. R. 552-555. Defense counsel requested two lesser included offense jury instructions for count one and count two. T. 552-554. Specifically, for count one, defense counsel requested the lesser included offenses of aggravated battery and misdemeanor battery. T. 552. For count two, defense counsel requested a category two lesser included offense of misdemeanor battery. T. 554.

In requesting these instructions, defense counsel informed the trial court that during arguments to the jury he wanted the jury to know that count one and count two have the same lesser included offenses. T. 552-553. In response, the trial court stated that it saw "no logic" in defense counsel's request but acknowledged that should the jury return a verdict of aggravated battery in count one and count two, based on one set of facts, then one count would have to be dismissed on double jeopardy grounds. T. 553. However, the trial court did not see that this request added "any clarity to the jury to put them in a position of having to make a determination of – making a finding of the same allegation" in count two. T. 553.

Defense counsel attempted to argue that count one and count two applied to two separate incidents and were two different sets of facts patterns, but both the trial

court and the State adamantly disagreed. T. 554-556. The trial court denied the request as to count one and went on to say, "I'm not going to put the jury in a position where they have to find a – make a finding that violates double jeopardy, so I will give you the lesser included offense of battery as to count [two], which appears that is warranted by the record evidence." T. 555. Thereafter, the instructions did not included the lesser included offenses for count one as the trial court ruled. R. 119-138.

D. Verdict and Sentencing Hearing

The jury returned verdicts of guilty as to both counts. R. 161-163. As to count one, the jury found Ms. Hayes guilty of the lesser included offense of aggravated assault. R. 163. This was the lowest identified lesser included offense on the verdict form. R. 163. On count two, the jury returned a verdict of guilty of aggravated battery with a firearm as charged in the information. R. 162.

Prior to imposing sentence, Ms. Hayes's trial attorney moved for the trial court to dismiss count one on the ground it violated double jeopardy. R. 219-225. During argument, the State provided two cases to the trial court for the proposition that multiple offenses can arise from the same set of facts without violating double jeopardy. T. 222-223 (citing *Virgil v. State*, 894 So. 2d 1053 (Fla. 5th DCA 2005); *Armstrong v. State*, 995 So. 2d 597 (Fla. 1st DCA 2008)). Following argument, the

trial court denied the defendant's request to dismiss count one relying on the cited precedent by the State. R. 224.

The trial court then imposed sentence. R. 224-225. The trial court imposed a thirty-year sentence with a twenty-five minimum mandatory as to count two. R. 224-226. On count one, the trial court imposed a five-year sentence to run concurrent with count two. R. 175-187; 224-226. Thereafter, Ms. Hayes's filed her notice of appeal. R. 200.

SUMMARY OF ARGUMENT

Defense counsel requested two lesser included offenses on count one and count two supported by both the charging document and the evidence adduced at trial. The trial court denied this request on double jeopardy concerns that were unrelated to the analysis of whether it was appropriate to give these instructions. By doing so, the trial court invaded the province of the jury which ultimately impacts both counts one and two. The trial court's decision to deny this request is reversible error that requires this Court to reverse and remand for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR CATEGORY TWO LESSER INCLUDED OFFENSE JURY INSTRUCTIONS.

A. Standard of Review

The standard of review to determine whether a trial court erred in denying a request for a jury instruction, if the facts are undisputed and the issue is properly preserved for appellate review, is *de novo*. *See Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010).

B. Preservation

To preserve a request for a lesser included offense jury instruction, the movant must only: (1) make a specific request; (2) set forth the required grounds for the request; (3) the judge must understand the request; and, (4) the judge must deny the request. *Wong v. State*, 212 So. 3d 351, 359 (Fla. 2017). "[N]othing more is required." *Id.* An oral request on the record is sufficient for purposes of preservation. *See Holley v. State*, 423 So. 2d 562, 564 (Fla. 1st DCA 1982).

Here, this issue is properly preserved. Defense counsel made specific requests for two category two lesser included offenses. T. 552-554. He set forth the required grounds for the request, i.e., that the instruction was a lesser included offense, and, among other reasons, the facts supported the request. *Id.* The judge understood that

he was requesting two lesser included offenses, and the judge denied the request. T. 554. Thus, this issue is preserved for this Court's consideration.

C. Lesser Included Offenses

There are two types of lesser included offenses—necessary lesser included offenses and permissive lesser included offenses. *See Moore v. State*, 932 So. 2d 524 (Fla. 4th DCA 2006). A requested instruction on a necessary, or category one lesser included offense, must be given upon request, even if unsupported by the evidence. *See Funiciello v. State*, 179 So. 3d 388, 389 (Fla. 5th DCA 2015). However, an instruction on a permissive, or category two lesser included offense, is only given when supported by the pleadings and evidence. *See Boland v. State*, 893 So. 2d 683, 686 (Fla. 2d DCA 2005).

When determining whether to authorize the use of a permissive lesser included offenses, "[t]he trial court is given the discretion to 'analyze the information or indictment and the proof to determine if elements of category [two] crimes may have been alleged and proved.'" *Cooper v. State*, 512 So. 2d 1071, 1072 (Fla. 1st DCA 1987) (quoting *State v. Wimberly*, 498 So. 2d 929, 931 (Fla. 1986)). Thus, by definition, "[p]ermissive lesser included category two offenses are those 'which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence, which will include all attempts and some lesser degrees of offenses.'" *Id.* at 527 (*quoting In re Standard Jury Instructions in Criminal*

Cases, 431 So. 2d 594, 596 (Fla.1981)). In other words, permissive lesser included offenses (category two offenses) exist when "the two offenses appear to be separate [on the face of the statutes], but the facts alleged in the accusatory pleadings are such that the lesser [included] offense cannot help but be perpetrated once the greater offense has been." *Sanders v. State*, 944 So. 2d 203, 206 (Fla. 2006) (alterations in original) (quoting *State v. Weller*, 590 So. 2d 923, 925 n.2 (Fla. 1991)).

A defendant is entitled to an instruction on a permissive lesser included offense upon request where two conditions are met: "(1) the indictment or information must allege all the statutory elements of the permissive lesser included offense; and (2) there must be some evidence adduced at trial establishing all of these elements." *Khianthalat v. State*, 974 So. 2d 359, 361 (Fla. 2008) (quoting *Jones v. State*, 666 So. 2d 960, 964 (Fla. 3d DCA 1996)); *see also* Fla. R. Crim. P. 3.510(b). No other requirements exist.

If the elements are present, then "[a]n instruction on a permissive lesser included offense should be precluded only where 'there is *a total lack of evidence of the lesser offense*.'" *See Amado v. State*, 585 So. 2d 282, 282-283 (Fla. 1991) (quoting *In re Use by Trial Courts of Standard Jury Instructions*, 431 So.2d 594, 597 (Fla.), *modified*, 431 So.2d 599 (Fla. 1981) (emphasis added). "Our precedent is likewise clear that a 'trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense

is a necessarily lesser included offense, an instruction must be given.'" *Roberts v. State*, 242 So. 3d 296, *6 (Fla. 2018) (quoting *Montgomery v. State*, 39 So. 3d 252, 259 (Fla. 2010) (quoting *State v. Wimberly*, 498 So. 2d 929, 932 (Fla. 1986)). When these conditions are met, the Florida Supreme Court has held that the failure to give a requested permissive lesser included offense instruction constitutes reversible error and the proper remedy is to vacate the judgment of guilt and order a new trial. *See Amado*, 585 So. 2d at 283; *Horn v. State*, 120 So. 3d 1, 3 (Fla. 1st DCA 2012). In this case, the trial court erred by denying the defense request.

(1) The Information in this Case Alleged All the Statutory Elements of the Permissive Lesser Included Offenses Requested for Count one.

In count one, the State charged Ms. Hayes with attempted first degree premeditated murder in violation of section 782.02(1)(a), Florida Statutes. R. 39. At the charge conference, Ms. Hayes requested the necessary lesser included offenses of aggravated battery and misdemeanor battery. T. 552-555. The essential elements of both offenses appear in the charging document, R. 39-41, and importantly, both aggravated battery and misdemeanor battery are enumerated in Florida Supreme Court Jury instructions as permissive category two lesser included offenses. Fla. Std. Jury Instr. (Crim.) 6.2. Therefore, in this case the information alleged all the statutory elements of the permissive lesser included offense. *Khianthalat*, 974 So. 2d at 361.

(2) There was Some Evidence Adduced at Trial Establishing All of the Elements for the Requests Lesser Included Offenses for Count one.

The State relied on the same facts to support the basis for counts one and two. This is evident based on the State's arguments at the time of the request for the instructions, T. 552-555, and during sentencing. R. 219-225.

When initially requesting the instruction, defense counsel argued that count one applied to a separate set of facts. T. 552-554. When he did so both the trial court and the State balked. T. 553-554. Although it denied his request, to show this was a single set of facts the trial court even went so far as to allow one of the requested lesser included offenses in count one, battery, to be listed as a lesser included offense in count two, because it appeared "that is warranted by the record evidence." T. 555.

Further, during sentencing, the State offered case law to support the position that, in a matter in which two convictions arise out of the same facts, two independent convictions based on the same fact do not violate double jeopardy. R. 222-223 (citing *Virgil*, 894 So. 2d at 1053; *Armstrong*, 995 So. 2d at 597). This was the basis for the trial court denying the dismissal of count one on double jeopardy grounds. R. 224.

Because the trial court found the same facts supported the giving of an instruction of the requested lesser included offenses in count two, it is indisputable that these same facts support the requested lesser included offenses in count one.

Thus, the trial court erred in denying Ms. Hayes' request for these lesser included offense instructions in count one.

(3) The Proper Remedy is a New Trial.

Where a defendant is entitled to an instruction on a permissive lesser included offense, the Florida Supreme Court has held that the failure to give a requested permissive lesser included offense instruction constitutes reversible error. *See Amado*, 585 So. 2d at 283. When a trial court reversibly errs in this fashion, the proper remedy is to vacate the judgment of guilt and order a new trial. *Wong*, 212 So. 3d at 360 (citing *Horn*, 120 So. 3d at 3). Here, because the trial court erred in denying the requested instruction, the only proper remedy is a new trial. Therefore, this Court should vacate the judgment and sentence and remand for a new trial.

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUEST FOR LESSER INCLUDED OFFENSES INVADED THE PROVINCE OF THE JURY

A new trial is required on both counts. The basis for the trial court's reversible error in this case stems from its decision to deny defense counsel's request for a necessary lesser included offense. T. 552-556. The reason failing to give a lesser included offense instruction is reversible error arises from jury's pardon power. *Roberts*, 242 So. 3d at 296; *Wong*, 212 So. 3d at 351. The failure to give such an instruction is reversible error because by failing to provide these instructions the trial

judge invades the province of the jury. *State v. Baker*, 456 So. 2d 419, 421, (Fla. 1984) ("Jury pardons are the province of the jury, and a trial court is not permitted to invade that province.") (citing *Brown v. State*, 206 So.2d 377 (Fla. 1968)).

Here, the trial court's denial of the lesser included offenses for a reason erroneously related to the basis for the request prevented the jury from considering the lesser included offenses on count one, which inevitably impacted defense counsel's arguments to the jury regarding count two. The trial court erred by invading the province of the jury. Here, because the trial court erred in denying the lesser included offenses on count one, count two should also be vacated and this Court should reverse and remand for a new trial on both counts one and two.

CONCLUSION

Appellant, FRANKIE HAYES, respectfully requests this Court vacate Ms. Hayes conviction and sentences, reverse to the trial court, and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the Office of the Attorney General at crimappdab@myfloridalegal.com on this the 30th day of June 2018.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

s/ Rocco J. Carbone, III
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