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JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES: DOES "SHALL" MEAN "MAY?"

The petitioners, Hand and Raulerson, were charged with and convicted of robbery. In the former case there was an oral request for a jury instruction on the lesser included offense of larceny and in the latter case there was a similar written request. The trial judges denied both requests. The First District Court of Appeal affirmed both the *Hand*[1] and *Raulerson*[2] convictions. The two cases were consolidated for purposes of appeal to the Supreme Court of Florida which *held*, reversed: Upon timely request a trial judge is duty bound to instruct the jury that should they be unable to find from the evidence, beyond reasonable doubt, that the defendant is guilty of the crime charged, they could consider the evidence to determine whether the defendant is guilty of a lesser included offense. *Hand v. State*, 199 So.2d 100 (Fla. 1967).

Florida statutory law reflects two legislative mandates which appear to govern the instant case. Florida Statutes, section 919.16 (1965), now known as Florida Rule of Criminal Procedure 1.510 declares:[3]

> Upon an indictment or information, for any offense the jurors may convict the defendant of an attempt to commit such offense, if such an attempt is an offense which is necessarily included in the offense charged. The court *shall* charge the jury in this regard. (emphasis added).

Furthermore, in the determination of degrees of an offense, Florida Statutes, section 919.14 (1965), now known as Florida Rule of Criminal Procedure 1.490 directs that:[4]

> 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 any lesser degree. The court *shall* in all such cases charge the jury as to the degrees of the offense. (emphasis added).

The main conflict within the cases which have interpreted sections 919.14 and 919.16 centers around the word *shall*. Does *shall* reflect a legislative mandate which prevents the trial judge from applying any

1. Hand v. State, 188 So.2d 364 (Fla. 1st Dist. 1966).
2. Raulerson v. State, 188 So.2d 586 (Fla. 1st Dist. 1966).
3. The new rule, effective midnight December 31, 1967, is the same as the statute except for the inclusion of the use of affidavits in the rule. The former statute is now superseded by the rule. *In re* Florida Rules of Criminal Procedure, 196 So.2d 124 (Fla. 1967).
4. *See* note 3 *supra*.

evidential tests before instructing the jury on lesser included offenses,[5] or does *shall* mean the trial judge *may* apply such evidential tests? The problem reduced to its simplest form is whether the giving of jury instructions on lesser included offenses is discretionary with the trial judge, or whether it is a mandatory requirement.

One line of case authority in Florida sanctions the trial judge's power to first evaluate the evidence to see if a reasonable jury could convict the defendant of a necessarily included lesser offense and not the offense charged. If the trial judge determines that a reasonable jury could not find that the defendant committed the lesser included offense, then the judge is under no duty to instruct on the lesser included offense. It is only when the evidence is reasonably susceptible of an inference by the jury, as determined by the judge, that the defendant could not have committed the offense charged, but that he could have committed a lesser included offense, that the judge must instruct on the lesser included offense.

The First District Court of Appeal in reviewing the *Hand*[6] case followed this line of authority. The court stated that the evidence was not reasonably susceptible of an inference by the jury that the articles were taken without force, violence, assault or putting in fear.[7] Therefore, an instruction on the lesser included offense of larceny was not warranted. In effect, the jury being unaware of its power to convict the defendant of larceny could either convict him of robbery or free him.

The foundation of this line of reasoning is embedded in decisions made prior to 1939,[8] the year in which sections 919.14 and 919.16 were enacted. It is interesting to note that some courts would choose to revert to the pre-1939 era.[9] Basically, Florida courts which have construed these statutes to confer a limited power on the trial judge to charge on lesser included offenses, have given jury instructions pertaining to lesser included offenses only when the record,[10] a reasonable view of the evi-

5. The threshold question in the instant case is whether or not the instruction asked for is one in regard to a necessarily lesser included offense. In regard to larceny, the Supreme Court in Arnold v. State, 83 So.2d 105, 108 (Fla. 1955) said: "There can be no doubt that the crime of robbery necessarily includes the crime of larceny, the difference primarily being that robbery is an aggravated form of larceny involving force and violence."

6. *Supra* note 1.

7. *Supra* note 1, at 365-366.

8. The Supreme Court recognized this line of reasoning in Southworth v. State, 98 Fla. 1184, 125 So. 345, 348 (1929) when it stated: "It is not the duty of the court to charge the jury upon a degree of homicide to which the evidence could not apply."

9. The Second District Court of Appeal in State v. Brown, 118 So.2d 574, 580 (Fla. 2d Dist. 1960) declared: "Were this court to have this question before us as one of first impression, we would follow the decisions of the Supreme Court of Florida which were rendered prior to 1939."

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

dence,[11] or the information or indictment[12] will support the lesser included offense.

The chief protagonist of this interpretation is the First District Court of Appeal. The majority[13] of cases decided by that court, have sustained the view that the evidence must be susceptible of an inference by the jury that the accused committed the lesser included offense and not the offense charged.[14] Possibly it is the court's strong conviction to limit the power of the jury which has prompted it to expose this position.[15] As the court explained in *Silver v. State*[16] (where the evidence did not point to the lesser included offense):

> [I]t is apparent that the jury could not with propriety have found the appellant guilty of petit larceny. To hold otherwise would permit the jury to usurp the legislative function by using its verdict as a vehicle by which to reduce the sentence to less than the minimum prescribed by the legislature for the crime committed, and also to usurp the judicial function by depriving the court of the power to impose a sentence within the limits prescribed by the statute for such crime.

This position would prevent the jury from mitigating the defendant's guilt by finding a verdict for a lesser included offense, thereby reducing the defendant's debt to society. Furthermore, as the Supreme Court implied in the *Hand* case, if the defendant is acquitted of the crime charged the state could institute another action bringing the defendant back into court on a necessarily included lesser offense which stemmed solely from the commission of the crime for which the defendant was acquitted.[17]

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11. Sandine v. State, 172 So.2d 634 (Fla. 3d Dist. 1965). For decisions rendered by the First District Court of Appeal, see note 14 *infra*.

12. Lindsay v. State, 53 Fla. 56, 43 So. 87 (1907); Stewart v. State, 187 So.2d 358 (Fla. 1st Dist. 1966); Bradney v. State, 185 So.2d 726 (Fla. 3d Dist. 1966).

13. The striking exception to the First District's trend of decisions is Allison v. State, 162 So.2d 922, 926 (Fla. 1st Dist. 1964). The Court stated in reference to instructions on lesser included offenses that: "[T]he court had the duty to so charge the jury even if the defendant had not requested such a charge."

14. Sprinkle v. State, 203 So.2d 48 (Fla. 1st Dist. 1967); Adams v. State, 201 So.2d 494 (Fla. 1st Dist. 1967); Tanner v. State, 197 So.2d 842 (Fla. 1st Dist. 1967); Toler v. State, 193 So.2d 651 (Fla. 1st Dist. 1967); Little v. State, 192 So.2d 793 (Fla. 1st Dist. 1966) rev'd, 206 So.2d 9 (Fla. 1968); Brown v. State, 191 So.2d 296 (Fla. 1st Dist. 1966); Raulerson v. State, 188 So.2d 586 (Fla. 1st Dist. 1966), *rev'd*, 199 So.2d 100 (Fla. 1967); Hand v. State, 188 So.2d 364 (Fla. 1st Dist. 1966), *rev'd*, 199 So.2d 100 (Fla. 1967); Stewart v. State, 187 So.2d 358 (Fla. 1st Dist. 1966); Silver v. State, 174 So.2d 91 (Fla. 1st Dist. 1965).

15. *See* Silver v. State, 174 So.2d 91 (Fla. 1st Dist. 1965).

16. *Id.* at 95.

17. This justification for the Supreme Court's decision in *Hand*, that instructing on lesser included offenses would eliminate this problem is difficult to accept. As early as 1884, in Boswell v. State, 20 Fla. 869 (1884) the Supreme Court recognized the principle that an acquittal or conviction of the offense charged would bar a subsequent prosecution for a lesser included offense. Furthermore, in Wilcox v. State, 183 So.2d 555, 558 (Fla. 3d Dist. 1966) the court said: "A prior conviction or acquittal will bar a subsequent trial for the same offense or for a lesser offense necessarily included in the first offense."

The second line of case authority in Florida is that the trial judge *shall* instruct the jury on necessarily included offenses.[18] This interpretation of sections 919.14 and 919.16 removes the trial judge's limited power to evaluate the evidence before he decides whether or not to charge the jury on lesser included offenses. An instruction to the jury on necessarily included lesser offenses *shall* be given, irrespective of whether or not the trial judge considers the lesser offense supported by reasonable inferences from the evidence. This was the position adopted by the Supreme Court of Florida in *Hand.*

The only conditions precedent to the trial judge's duty to so instruct are that the charge asked for is a necessarily included offense[19] and that the defendant in fact requested such a charge.[20] As in the present consolidated cases, either an oral request or a written request made to the trial judge will suffice.

There are two factors which must be explored before this issue can be considered settled in Florida. These factors appear on the legal horizon as clouds to the certainty of the Supreme Court's decision in *Hand.*

The first cloud springs from the Supreme Court itself. In the case of *Flagler v. State,*[21] decided two months prior to the *Hand* case, dealing with the necessity to *request* instructions on lesser included offenses, the court tended to support the view that the judge could evaluate the evidence. The opinion praises the view taken by the First District Court of Appeal, the very same view which the court reversed shortly thereafter in *Hand.* The court stated:

> To begin, it seems to this court that the 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, 191 So.2d 296. According to the opinion in that case, the sole question presented on appeal was whether or not error was committed when the trial judge declined to charge the jury on the lesser included offense of petit larceny. The court held that the giving of such a charge would have been error even if it had been requested in writing.[22] (emphasis added).

It is difficult to reconcile the fact that the court praises the line of reasoning which it is soon to reverse. The doctrine in *Brown*[23] would give the

18. Pait v. State, 112 So.2d 380 (Fla. 1959); Killen v. State, 92 So.2d 825 (Fla. 1957); Jimenez v. State, 158 Fla. 719, 30 So.2d 292 (1947); State v. Barnes, 182 So.2d 260 (Fla. 2d Dist. 1966); Wilson v. State, 171 So.2d 903 (Fla. 2d Dist. 1965); Miller v. State, 170 So.2d 319 (Fla. 2d Dist. 1964).

19. *See* note 5 *supra.*

20. Flagler v. State, 198 So.2d 313 (Fla. 1967).

21. 198 So.2d 313 (Fla. 1967).

22. *Id.* at 314.

23. Brown v. State, 191 So.2d 296 (Fla. 1st Dist. 1966).

trial judge the power to test the evidence. Whereas the doctrine in *Hand* dictates that no evidential tests *shall* be applicable.

The second cloud springs from that noted area of turbulence on this issue, the First District Court of Appeal. In two cases subsequent to the *Hand* case the First District bitterly attacks the *Hand* position. In *Adams v. State*,[24] Chief Judge Wigginton, concurring specially, announced:

> [T]he principle of law pronounced by the Supreme Court in the Hand and Raulerson cases, cited in the majority opinion, is *bad law*, unsupportable by logic or reason, and requires the giving of instructions in the trial of criminal cases which have no foundation in or relationship to the evidence adduced at the trial.[25] (emphasis added).

In the subsequent case of *Griffin v. State*,[26] the court in commenting upon the logic deduced from the *Hand* case stated:

> Under this reasoning a trial court should never be allowed to direct a verdict or render a summary judgment in favor of either party to any judicial proceeding on the ground there is no evidence to support a verdict for the nonmoving party because in doing so the trial judge would thereby be invading the province of the jury.[27]

The First District, although following the *Hand* decision, has openly challenged the validity of the Supreme Court's decision possibly in an attempt to convince the Supreme Court to retreat to the First District's view.

It is the writer's opinion that Florida has adopted a realistic understanding of the purpose of the jury in criminal cases with the *Hand* decision. Sections 919.14 and 919.16 allow the jury to return a verdict convicting the defendant of a lesser degree, or a necessarily lesser included offense of the crime charged. Therefore, why should the judge be a middleman to decide what a reasonable jury could infer from the evidence pertaining to the lesser included offense? The Supreme Court has stated: "[T]he responsibility of determining the degree of guilt in such cases rests peculiarly within the bosom of the trial jury."[28] If the jury is charged with determining the guilt of the defendant then it should be given as many instructions as are proper to aid them in determining the defendant's debt to society. The jury which does not know that it has the alternatives of freeing the defendant, convicting him of the offense charged or

24. Adams v. State, 201 So.2d 494 (Fla. 1st Dist. 1967). The court did apply the *Hand* decision, although criticizing its merit.

25. *Id.* at 495.

26. Griffin v. State, 202 So.2d 602 (Fla. 1st Dist. 1967). The court did apply the *Hand* decision, although criticizing its merit.

27. *Id.* at 603.

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

convicting him of a lesser included offense, cannot render an acceptable verdict in line with the laws of Florida.[29]

CHARLES KANTOR

IMPLIED WARRANTY: DISCLAIMER INEFFECTIVE

Plaintiff brought an action against the manufacturer and retail dealer alleging breach of express and implied warranties and demanding return of the purchase price of a "lemon" automobile. The trial court granted final summary judgment for the manufacturer based upon a lack of privity and the disclaimer of warranties contained in the contract of sale. The District Court of Appeal, Third District, affirmed, *per curiam*. On certification to the Supreme Court of Florida, *held*, reversed and remanded: An action may be maintained against a manufacturer notwithstanding a lack of privity.[1] Furthermore, the terms of the contract of sale do not operate to disclaim implied warranties. There is no sound reason for distinguishing between liability for personal injury and economic loss on these issues,[2] and liability is particularly warranted where the manufacturer uses mass advertising to market his product.[3] *Manheim v. Ford Motor Co.*, 201 So.2d 440 (Fla. 1967).

29. The Supreme Court reaffirmed this view in the recent case of Little v. State, 206 So.2d 9 (Fla. 1968). The Court held that where the lower court in a robbery prosecution found that the crime of robbery had been proved, the defendant was entitled to an instruction on the lesser included offense of larceny.

1. Except for the advertising rationale, this issue will not be noted because it was already well established in Florida that lack of privity did not bar an implied warranty action against a manufacturer. Lily-Tulip Cup Corp. v. Bernstein, 181 So.2d 641 (Fla. 1966); Power Ski, Inc. v. Allied Chem. Corp., 188 So.2d 13 (Fla. 3d Dist. 1966). *See also* Engel v. Lawyers Co-operative Publishing Co., 198 So.2d 93 (Fla. 3d Dist. 1967) (warranty coverage still limited to users of the product).

2. A well-developed discussion of this point may be found in Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), *reversing* 82 N.J. Super. 319, 197 A.2d 589 (App. Div. 1964).

3. It should be emphasized that the decision went on to only discuss the manufacturer's liability under implied warranties. The court did not hold that the mass advertising created either an express or implied warranty. The failure to clearly state what express warranty liability existed or to distinguish between express and implied warranty liability considerably clouded the opinion.

Some jurisdictions have used mass advertising by the manufacturer as a rationale for eliminating the privity requirement in implied warranty actions. Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1964); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 154 S.E.2d 337 (1967); Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

Other jurisdictions have held that mass advertising creates an express warranty upon which the ultimate buyer may bring an action. Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931); Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253