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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

RICHARD EARL WALKER,

Petitioner,

vs. Case No. 78,759

STATE OF FLORIDA,

Respondent.

_______________________/

DISCRETIONARY REVIEW FROM THE
FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT
IN LAKELAND, FLORIDA

INITIAL BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Respondent does not abandon its position that discretionary review cannot be based on a dissenting opinion; and, Respondent suggests that review in this case may have been improvidently granted.

Respondent submits that in a trial for kidnapping, the question of Petitioner's guilt and all questions of fact are to be determined by the trier of fact once a prima facie case is established. Petitioner was charged with kidnapping pursuant to §787.01(1)(a)2, Florida Statutes (1989) where the term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to: Commit or faclitate commission of any felony [here robbery]. (R 249-251). Petitioner was convicted and appealed. The Second District affirmed with Judge Patterson filing a dissent. See, Walker v. State, 585 So.2d 1107 (Fla. 2d DCA 1992). On February 24, 1992, this Court accepted jurisdiction and dispensed with oral argument.

ISSUE ONE

WHETHER THE VERDICT OF GUILTY EMBRACED ALL THE ESSENTIAL ELEMENTS OF THE CRIME OF KIDNAPPING.

(As Restated by Respondent)

At bar, it was the function of the jury to determine the weight of the testimony given by all witnesses and also determine the credibility including that of the Petitioner, Richard Walker. As in all cases, the jury must determine the questions of fact in issues such as Petitioner's purpose or intent in the taking and detention. Petitioner testified. Petitioner's purpose in entering the convenience store was to rob it. (R 95) Why did he rob it? Because he needed the money. (R 95) Why did he need the money? Because he had joined the nation's rank of unemployed.[1] (R 95) Petitioner covertly displayed an object [a stick] under his pants to make the robbery easier--to make it appear that he had a gun. (R 95-96)[2] Petitioner admitted taking money from two victims. (R 96-97) Petitioner then testified he left the store. (R 97)

On cross-examination, Petitioner could not recall whether he threatened to blow off the head of the cashier. (R 99) Petitioner recalled his declaration: "Open the fucking cash

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[1] Petitioner had been unemployed for one week. (R 103) Petitioner resided with his parents and paid no rent. (102-103) Petitioner had been employed for ten months earning $600.00/month and paying $25.00/week rent. (R 104-105) Petitioner needed the proceeds of the robbery to purchase "clothes and things." (R 107) Petitioner denied that he robbed to purchase drugs. (R 108)

[2] There is direct evidence that Petitioner was, in fact, armed with a gun. (R 37)

register." (R 99 -100) Petitioner admitted that he lead his victims to believe he was armed. (R 100; 109) Petitioner admitted ordering his victims to the back of the store. (R 111) Petitioner admitted the use of force, compulsion, and threats in making his victims move to the back of the store. (R 109-110) Helen East testified as to why she went to the back of the store:

> Q. Why did you go back there?
>
> A. Because he told us, too, he was waving his arms around and he was getting really hyper, so I was scared. I went and my sister was right beside me.
>
> Q. Your sister Robin?
>
> A. Robin, Yeah.
>
> Q. Did she go back there with you?
>
> A. Yeah, she was right beside me when we went back there.
>
> Q. Were you told to do anything once you went back to the corner?
>
> A. Yes, lay down. He said, "Get back in the corner and lay down on the floor." And that's what we did.
>
> Q. Who was the first to get on the floor?
>
> A. Robin.
>
> Q. Did she actually lay on the floor?
>
> A. Yes, she laid on the floor? (R 28)

Robin Gallagher testified that Petitioner was, in fact, armed with a gun and that she was so scared while she was on her stomach that she wet her pants. (R 39-40)

The following is Petitioner's testimony as to why he ordered his victims to move to the back of the store and why he ordered them to the floor:

Q. You did that -- you ordered them back there so you can get away easier, didn't you?

A. I ordered them to the back of the store so they wouldn't stop me from leaving.

Q. You were afraid that those three girls and a seventy-one-year-old man were going to stop you from leaving?

A. I was afraid they might get in my way on the way out the door or lock the door.

Q. Okay. So you put them back there so you could get away easier, right?

A. I put them back there so they wouldn't stop me and lock the door. (R 112)

and

Q. Okay. So you thought these people -- these girls and the old man who you had just robbed, you were afraid one of them was going to lock the door and keep you in?

A. No, but I was afraid that they would get in my way of something.

Q. Yeah. But you just said you were afraid somebody was going to lock the door and keep you in, isn't that what you just said?

A. No, I didn't say that.

Q. You didn't say that?

A. I said I thought one of them might get in my way or try to lock the door. (R 113)

and

Q. All right. What was the purpose of having those four people lie on the -- on the floor? Tell the jury why did you want them twenty feet away on the floor?

A. To leave the store.

Q. Excuse me?

A. To leave the store.

Q. What do you mean to leave the store?

A. To leave the store after I robbed it. I left the store.

Q. To make it easier to commit your robbery. Correct?

MR. GARLIST: Same objection, Your Honor.

THE COURT: Overrule the objection.

BY MR. BISCONTI:

Q. Didn't it make it easier to commit the robbery?

A. Yes, it did.

Q. Didn't it make it easier if they were flat on the floor your chances of getting caught?

A. They didn't get flat on the floor.

Q. You told them to get on the floor, didn't you?

A. Yes, I did.

Q. How do you know they didn't get on the floor?

A. Because as I was leaving, they were still up and the old man was still walking back -- walking back there, so he wasn't on the floor and they wasn't on the floor. They were just in the back.

Q. But you told them to get on the floor back there to reduce the risk of getting caught in this robbery, isn't that right?

A. Yes. (R 115-116)

All female victims testified as to lying down. (R 27; 28; 40; 43; 54; 60)

Mr. Haga testified as to the following:

Q. You took the money out of your wallet?

A. I took the money out the wallet.

Q. And did you actually hand it to him?

A. Yeah. Handed it to him.

Q. Why did you hand it over to him?

A. Well, I didn't want -- didn't want to jump him for he had a bulge here in his waistband in his shirt.

Q. What did it look like, there was something under his shirt?

A. Something under his shirt and his trousers.

Q. Did he every threaten you with that?

A. Well, he told me, he said, "Get behind the -- go over there by the cooler and get behind there or I'll shoot you."

Q. Did you know where he was talking about?

A. Yeah, over with the other girls that went over there.

Q. All right. Is that when you gave him the money or is that after?

A. It was -- let's see, that was -- I gave him the money then he told me to get behind the cooler or get over by the cooler.

Q. Okay. What did you do then?

A. I walked over there, but I never did go by the cooler.

Q. Where did you go?

A. I -- I went behind the first display case.

Q. How far -- how far was it from where you were talking with the defendant to the display case?

A. Oh, I guess maybe ten foot.

Q. Why did you go over there?

A. He told me to go over there or he would shoot me. (R 68-69)

At the close of the prosecution's case, Petitioner moved for a directed verdict as to the robbery and kidnapping counts. (R 78-82) The prosecution then submitted the authority of Faison v. State, 426 So.2d 963 (Fla. 1983); Ferguson v. State, 519 So.2d 747 (Fla. 4th DCA 1987); Johnson v. State, 509 So.2d 1237 (Fla. 4th DCA 1987); Lamarca v. State, 515 So.2d 309 (Fla. 3d DCA 1987); Taylor v. State, 481 So.2d 97 (Fla. 3d DCA 1986); and, Dowdell v. State, 415 So.2d 144 (Fla. 1st DCA 1982), review denied, 429 So.2d 51 (Fla. 1983) in opposition to the motion. (R 82-83) In other words, there were material issues of fact to submit to the jury. Judge Bucklew took the legal authority under advisement and retired to consider the motion. (R 89) The trial judge ruled:

> THE COURT: I've had an opportunity to read all of the cases and, Mr. Garlisi, I'm going to deny the motion for judgment of acquittal.
>
> And in so doing, I'm going to find that the movement, and the movement was from one side of the store to the other, was not necessary or was not inherent in the nature of the offense and not a part of the robbery. It has some significance independent of the other offense in that it made the other offense substantially easier to commit in that he was able to get away and substantially lessened the risk of detection in that they were on the floor, were told to get on the floor away from the windows.
>
> I realize that the distance was not far, but I'm not sure that the short distance makes a whole lot of difference.
>
> As far as the first factor, that whether it's slight or inconsequential, I think the fact that it was done to lessen the risk of detection in this case makes it not just simply incidental but of more significance.

> Now, the jury may well find that it's slight and inconsequential, but I'm going to leave that decision to them if they wish to make it and I'm going to deny the motion. (R 89-90)

And, after the defense rested, the motion was again denied. (R 119).

The instructions in this prosecution defined kidnapping and informed the jury as to the law of the case. (163-168) There were no objections to the instructions. (R 186-187) Here, the instructions do not misstate the law; they are not misleading; and, they do not invade the province of the trier of fact. Upon proper instruction, the jury has determined, as a matter of fact, that the kidnapping [confinement] was not slight, inconsequential, or incidental to the felony. (R 164; 166; 167; 168) And, was it error to submit this question to the jury? No. For example, in James v. State, 453 So.2d 786, 791 (Fla. 1984), cert. denied, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984), Judge Rogers Padgett, on instruction, had the jury determine whether Davidson Joel James [the accomplice to Larry Clark who had committed the actual murder] killed Dorothy Satey or attempted to kill Dorothy Satey or intended that a killing take place, or intended that a lethal force would be employed. Just as it was appropriate for the jury to make Edmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) determinations in James, it was just as appropriate for the jury to resolve whether these acts of Richard Earl Walker were slight and incidental to the robbery.

A guilty verdict was returned. (R 188-189) Petitioner was found guilty of two counts of robbery with a weapon; three counts

of kidnapping with a weapon; and, one count of kidnapping. (R 188-189) Sentencing, in this case, is neither a small nor inconsequential matter. The trial court might have conceivably pronounced a sentence up to life. (R 201) The sentencing was then negotiated (R 201) because of pending additional prosecutions: State of Florida v. Richard Earl Walker, Fla. 13th Case Nos. 89-12757; 89-12758; 89-12759; 89-12985; 89-12986; 89-12987; 89-12988; 89-12989; 89-13083; 89-13085; and, 89-13229 (then open prosecutions). (R 203-204) There is no question but that Petitioner has benefited.

The trial court has accomplished three things: findings of fact; declaration of legal principles; and, application of law to the specific facts of this kidnapping case. At bar, the trial court has not erred in allowing the jury to determine the questions of fact. The majority opinion, below, recognizes this function of the trier of fact once a prima facie case was established. See, Walker v. State, 585 So.2d 1107 (Fla. 2d DCA 1991). The majority opinion answered the dissent of Judge Patterson pointing out that after the robbery, Petitioner ordered [with a gun] all four of the occupants to go to the back of the store and lie on the floor so that he might escape. Because of this admission (R 112-115), the majority held that it became a factual question, which the jury decided against Petitioner, as to whether Petitioner's movement of the victims fell within the teachings of Ferguson v. State, 533 So.2d 763 (Fla. 1988) and Faison v. State, 426 So.2d 963 (Fla. 1983). The jury was properly instructed as to the elements of kidnapping (R 163-168)

and there is direct evidentiary support. The court below gave deference to the jury application of law to the specific facts of the case. In other words, the majority declined to review the factual determinations de novo.

Whether "confinement and movement" of victims was incidental to the robbery was *not* a question of law because of Petitioner's own admissions. Thus, the majority was not incorrect in declining to substitute its judgment for that of the jury. In other words, a legitimate jury issue was established by the prosecution; and, Petitioner's admissions presented a jury issue as to the elements of kidnapping.

This case focuses on the scope of review of a Florida appellate court. There is no question but that, as a matter of law, the prosecution presented a prima facie case of kidnapping. Is there any question but that the female victims would not have moved to the back of the store and laid down [with one young woman becoming *incontinent*] *had this* armed Petitioner *not* threatened them? Were not these victims subjected to the threat of force and violence? Were these victims not compelled to comply with Petitioner's directives? The victims were seized; held against their will; and, detained while Petitioner escaped. In fact, Petitioner testified that his purpose in moving the victims within the store was so that "... they wouldn't stop me and lock the door." (R 112) What amounts to detention depends on the circumstances. Here, the prosecution presented evidence of the forcible seizing and confining of the victims; and, Petitioner was faced with the burden of producing evidence that

these victims were not detained against their respective will. In this case, Petitioner failed. In no way did these female victims voluntarily go the back of the store; lay on the floor; and, with one victim losing urinary control. Substantial evidence was produced to establish that the detention and movement:

> (1) Must not be slight, inconsequential and merely incidental to the robbery;
>
> (2) Must not be of the kind inherent in the nature of the other crime; and,
>
> (3) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detention.

See, Faison v. State, 426 So.2d 963, 965 (Fla. 1983). Under §787.01(1)(a)2, Florida Statutes (1989), it is the fact, not the distance, of forcible movement and detention which constitutes kidnapping. Both Faison and Ferguson v. State, 533 So.2d 763 (Fla. 1988) construe the statute to prevent a "standstill kidnapping". And, it is the "standstill kidnapping" which will neither support a prima facie case or a verdict as a matter of law. At bar, four victims responded to the same force [where Petitioner represented he was armed]; wherein, they were ordered about and subjected to gross indignities establishing the four separate kidnappings.

The majority opinion has recognized that the Second District's scope of review is to correct trial court errors; and, here, there was none. The dissent attempts to "make law" by reweighing jury determined facts; or, act as a court of equity.

In other words, neither the direct appeal nor this discretionary review is to be a second trial. However, the majority has applied the correct principle of law. In other words, are the material findings of fact supported by the evidence contained in this record? Is there not competent and substantial evidence to support the kidnapping verdicts? Obviously, resolution of the credibility determinations is left to the trier of fact; and, the weight of the evidence is appropriate for determination in the trial court. See, Tibbs v. State, 397 So.2d 1120 (Fla. 1980), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) [an appellate court may not consider the weight of the evidence as a basis for the reversal of a criminal conviction]. And, there was no misapplication of law to undisputed facts. Here, a prima facie case of kidnapping was established; and, it was appropriate for the jury to consider the case. Then, Petitioner chose to testify and the evidence of kidnapping was disputed. Did not Petitioner deny that he was armed with a gun (R 96); and, did not one of the victims testify that she saw a gun? (R 37; 39)

Against this record, the majority saw no error to correct in the trial court's decision to submit the kidnapping charges to the jury. It is a discretionary matter for the trial court to render a judgment of acquittal. See, Fla.R.Crim.Pr. 3.380. As such, the majority has not erred in recognizing that a prima facie case was established and submitting the factual determinations to the jury. Below, the dissent disagrees with the trial court's ruling; and, this is not a basis for reversal. Was not a prima facie case established as to kidnapping; and,

whether the "admitted" movement of the victims was either significant or a matter of consequence, is a factual question for determination by the jury who has ultimate factual decision making authority.

The prosecution presented a prima facie case of kidnapping; and, prima facie evidence is evidence sufficient to establish a fact unless and until rebutted. See, State v. Kahler, 232 So.2d 166, 168 (Fla. 1970). And, in this crime, was not the Petitioner a bit concerned about one of the victims; to wit, Garland Albert Haga [a seventy-one year old security guard from of the River Place Apartments]. (R 64) And, did not Mr. Haga resist the robbery? (R 67-68) Mr. Haga did not immediately tender the cash in his Wallet to Petitioner; and, Mr. Haga declined engaging Petitioner because of the bulge in his waistband. (R 68) Respondent would submit that this record establishes that Mr. Haga was a "reluctant" victim and when ordered to move over with the female victims, Mr. Haga declined. (R 69) For all Petitioner knew, Mr. Haga may well have attempted to block his flight. Why? Because Mr. Haga was not a submissive victim. And, does this not raise a presumption of fact for jury resolution. Petitioner was afforded an opportunity to overcome the presumption that his detention of his victims was not a matter of consequence; and, the verdict speaks against him.

Whether "detention or movement" is slight, inconsequential, or incidental to a robbery is to be determined on a case-by-case basis. In this robbery, Petitioner was not faced with an acquiescent victim in Mr. Haga. There was a purpose in this

kidnapping; and, the kidnapping substantially facilitated the robbery and lessened Petitioner's apprehension. This was a matter to be submitted to the jury upon proper instruction. It was; and, it was determined by the trier of fact.

The dissent places significant reliance on Kirtsey v. State, 511 So.2d 744 (Fla. 5th DCA 1987).[3] There, James Kirtsey attempted to rob a Pizza Hut in Volusia County, Florida. It was closing time. James Kirtsey and a co-principal forced themselves into the Pizza Hut. Two employees were remaining. One of the employees was tied up and moved about the establishment. The other was forced to open the safe and threatened with a gun. James Kirtsey stood convicted of attempted robbery and kidnapping on appeal. The robbery had not been completed. The confinement and detention of the victims was found to be less than a matter of consequence. The Kirtsey opinion is silent as to the instructions given the jury; however, Respondent would suggest that Mr. Kirtsey's jury did not find as fact the victims' dention and confinement to be small of importance or trifling to the robbery. Nor did Mr. Kirtsey's jury find the victims' confinement and detention to be an intrinsic or an essential characteristic of the robbery. Nor did Mr. Kirtsey's jury find that tying up one of the victims make the robbery more difficult to commit or substantially increase the risk of detection.

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[3] Discetionary review was not sought in this Court on the basis of Faison v. State, 426 So.2d 963 (Fla. 1983) in Kirtsey. However, the Fifth District has followed Kirtsey in Keller v. State, 586 So.2d 1258, 1261-1262 (Fla. 5th DCA 1991). The Keller decision is final. There, the "incidental confinement" test was applied to the crime of false imprisonment.

Subsequent to Walker v. State, 585 So.2d 1107 (Fla. 2d DCA 1991), this Court has reviewed Bedford v. State, 589 So.2d 245 (Fla. 1991), rehearing denied Dec. 9, 1991. There Michael J. Bedford stood before this Court convicted of first-degree murder and kidnapping of the late Deborah Herdmann. Miss Herdman's nude body was found abandoned next to a dumpster in a shopping center. Her corpse was found with her hands bound behind her back and her mouth taped. Human feces were on her hands.[4] Michael Bedford portrayed the late Miss Herdmann as a compulsive protagonist or Fatal Attraction type leading character. Michael Bedford [the purported "stalked" victim] presented a defense of accidental death during "erotic sexual asphyxia". The defense was rejected [there was evidence of sexual intercourse; but, no evidence of forcible rape]. Michael Bedford was found guilty, as charged, of first-degree murder and kidnapping. On direct appeal, Michael Bedford raised six (6) challenges to his conviction; and, one focused on kidnapping. The issue before this Court read: "...the conviction for kidnapping must be reversed because a) there is insufficient evidence of confinement and intent, b) there was no evidence of corpus delicti, and c) the term "intent to terrorize" as used in the kidnapping statute is unconstitutionally vague and overbroad." Michael Bedord was charged with confining, abducting, or imprisoning Deborah Herdmann with the intent to "[i]nflict bodily harm upon or

---

[4] The late Miss Herdmann also became incontient as did Robin Eugena Gallagher. (R 40) Miss Gallagher lived to tell of her experience; and, Miss Herdman died and the physical condition of her corpse spoke.

terrorize"; and, here Petitioner was charged with "... unlawfully, without authority forcibly, by threat, or secretly confine, abduct, imprison or restrain..." the four victims against their individual respective wills. (R 246) At bar, there is record support for the jury finding that the four victims were restrained, by threat, against their respective wills; and, Respondent contends that these kidnappings were not of a minor, casual, concomitant, or subordinate event in the lives of the victims. For example, Robin Eugena Gallagher was not robbed; but, she was restrained and forced to lie on the floor. As a result, she became incapable of controlling her bladder and "wet her pants". (R 40) Although Petitioner was not charged with terrorizing Ms. Gallagher, there is no question but that she was tensely overwhelmed with fear to the extent that she [like Deborah Herdman] became incontinent; whereby, did not the late Deborah Herdmann become incapable of controlling her excretory functions as this Court's opinion notes: "There was human feces on her hands". See, Bedford v. State, 589 So.2d 245 at 247 (Fla. 1991). When human beings lose control of their bodily functions because of the acts of another human being, these are neither speculative nor vague matters of consequence. This is of some magnitude and importance and embarrassment and indignity to the kidnap victim.

Nothing was taken from Miss Gallagher. But for good fortune, she survives. She was an innocent bystander who witnessed a robbery. She is not a robbery victim; but, she is a kidnap victim. To Miss Gallagher, the robbery is merely

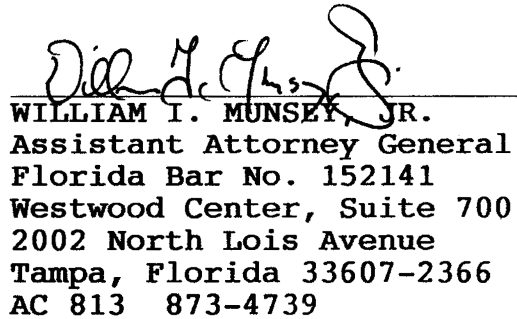
concomitant to her kidnapping. The four kidnapping convictions must not be vacated. The trial court has not abused its discretion, on these facts, in declining to enter a judgment of acquittal. The charges of kidnapping were properly submitted to the jury.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, Respondent would pray that this Court would make and render an Opinion adopting and approving the Second District majority opinion as its own.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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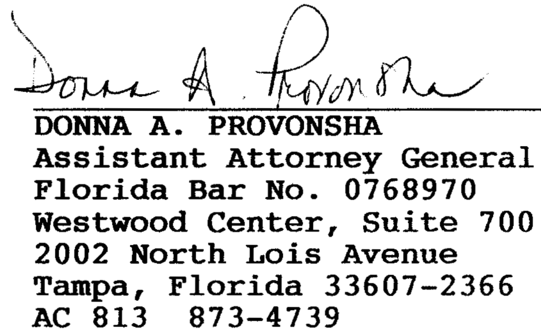

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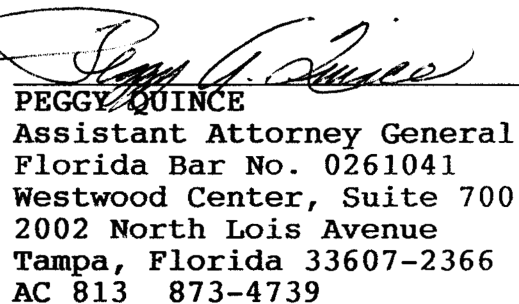

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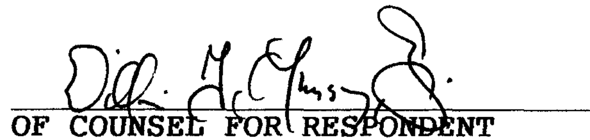
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to TIMOTHY A. HICKEY, Ass't Public Defender, Office of the Public Defender, P.O. Box 9000--Drawer PD, Bartow, FL 33830 on this 1st day of April, 1992.



OF COUNSEL FOR RESPONDENT