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FEB 17 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

JERRY RAY ROBINS, :

Petitioner, :

v. : CASE NO. 78,876

STATE OF FLORIDA, :

Respondent. :

_____ :

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The state charged Jerry Ray Robins, petitioner, with "armed kidnapping" and "armed robbery". R.22.[1] A Duval county jury found Robins guilty as charged. R.29-30;T.278.

The state's evidence

Norma McCullough testified that she was the victim of a kidnapping and robbery which occurred on 20 May 1990. T.22. That evening, McCullough and her boyfriend were at home watching television. T.22. Around 11 p.m., McCullough walked alone to the Jiffy Mart to buy a pack of cigarettes. T.22. The Jiffy Mart was closed so she went to a nearby bar and purchased the cigarettes there. T.22-3. As McCullough was walking home, two men grabbed her by both her elbows and took her down an alley and to a field. T.23. McCullough tried to resist by pulling away but there was "something" stuck in her back. T.24. At the field, the two men threw McCullough to the ground and one sat on top of her while the other held her arms down. T.24. McCullough cried out for help and pleaded with them not to hurt her. T.24. The man on top of her said that he was going to kill her and "bust [her] brains out". T.24. At that point, another man appeared by the fence and asked what was going on. T.24. The two men pulled McCullough up, struck her in the mouth, told her not to say anything and then took

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[1]Citation to the documents contained in the record on appeal will be as R.(page number). Citation to the trial transcript will be as T.(page number).

her to another field where they threw her on the ground again. T.24.

Two other men came to McCullough's aid at the second field. A gunshot was fired and the two men stopped their attack on McCullough. T.35. McCullough testified that Robins was one of the men that attacked her. T.35. The other man fled the scene. T.36. Just before fleeing, the other man snatched three gold chains off McCullough's neck, and put it in his pocket. T.34,36. He did this before the gunshot. T.36. During cross-examination, McCullough testified that the other man snatched her jewelry just before the police arrived. T.42. However, she remembered telling a different version during her deposition:

> Q. Do you remember me taking your deposition on August 1st?
> A. Yes, ma'am.
> Q. I ask you if you recall this question and this answer . . . Question, had your jewelry been taken? No, that's after the cops came up that they had took my jewelry. Wait a minute. Let me this. Yes, because he got away. They snatched my jewelry and ran. Do you remember telling me it was after the police came up?
> A. Yes, ma'am.

T.42.

Willie Thompson testified that he was in the area with a girl friend and another friend when his truck broke down. T.59. The friend left to call for help. T.59. As they waited for help to arrive, he heard a woman's voice in "distress". T.60. Thompson approached the field and asked if everything was alright. T.60. The two men responded that this was their business and this silenced the woman. T.60. Thompson went

back to his truck to get "a piece of iron or a jack handle to protect" himself. T.61. The two men took the woman to another field. T.61. As Thompson returned to his car, John Parker arrived. T.61. Parker was Thompson's friend who had been called to help. T.61. Thompson asked Parker for a weapon and he produced two guns. T.61. The two went to the second field. T.61. Parker got into a fight with one of the men. T.74. A gunshot went off, and Parker hit one of the men on the side of the face and the two began to fight. T.74. The police arrived within several minutes. T.74-5. In cross-examination, Thompson testified that he did not see the taking of McCullough's jewelry. T.85.

Parker testified that he arrived on the scene in response to a call to help Thompson with his stalled truck. T.106. When he arrived, Thompson explained the situation to him and he grabbed two guns from his glove compartment. T.107. Parker told his wife to call the police. T.107. When they got to the field, Thompson saw Robins holding McCullough down on the ground. T.107. Parker approached him and asked him what he was doing. T.108. Robins then said, "nigger you don't tell me what to do." T.108. Robins was coming after him as Parker fired his gun once into the air. T.108. Robins continued to come toward him so Parker hit him with the gun and the two began to wrestle. T.108-9. Robins was hit on the side of the face. T.109. The two continued to wrestle over the gun and they went back toward the street. T.109. At this point, the police arrived. T.109.

While he had been wrestling with Robins, the other unidentified man was with McCullough and he was "kind of looking and glancing". T.112. This other man had a "small caliber gun" in his hand. T.112. When they were out on the street and as the police arrived, this other man ran away with the gun in his hand. T.112.

At the close of the state's evidence, defense attorney Laurie A. Sistrunk, moved for a judgment of acquittal. T.140. On the robbery charge, Sistrunk argued that the principal theory could not be used in this case because McCullough testified that the robbery occurred after the police had arrived. T.141. The trial judge denied the motion. T.143.

The state relied on a principal theory to convict Robins of armed robbery. T.253. The trial judge instructed the jury on the principal theory. T.268-9.

Sentencing

The guidelines scoresheet listed the kidnapping count as the primary offense. R.40. The kidnapping count was scored at 241 points, as a life felony. During trial, the prosecutor explained to the trial judge that he was attempting to reclassify the kidnapping count as a life felony. T.142. Since no testimony established that Robins was carrying a firearm, the state argued that under a principal theory, kidnaping could be reclassified under section 775.087(1), Florida Statutes. T.141.

The trial judge adjudicated Robins guilty of both kidnapping and armed robbery. R.34-9;T.296. The trial judge

then sentenced Robins to concurrent sentences of 40 years imprisonment, a guidelines sentence. R.34-9;T.296 However, the trial judge relied on the score sheet which scored the kidnapping count at 241, as a life felony. R.40.

Appeal of the judgment and sentence

Robins appealed the judgment and sentence to the first district court of appeal. Robins argued that the trial court erred in denying his motion for judgment of acquittal on the armed robbery count. In a written opinion, the district court held "that the denial of the motion was proper because the evidence clearly supports a determination that, as a participant in a criminal scheme, [Robins] was a principal in that offense....." Robins v. State, 587 So.2d 581 (Fla. 1st DCA 1991).

The district court also rejected Robins's argument that the trial judge erred in sentencing him based on a scoresheet that reclassified the kidnapping count as a life felony pursuant to section 775.087(1). Id. at 583. The district court stated: "the intent of section 775.087(1) is to deter the use of firearms and other weapons during the commission of criminal offenses." The district court then read this statute in pari materia with section 777.011, Florida Statutes (the principal statute) and found that

> when one is guilty as a principal in the commission of a criminal offense or offenses, if during the commission of that criminal scheme either he or his accomplice wields a weapon in furtherance of the criminal scheme, application of section

> 775.087(1) to enhance his offense is proper.

Id. The court then expressly rejected the holding in Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989), requiring actual physical possession of the firearm on the part of the defendant.

SUMMARY OF ARGUMENT

The trial court sentenced Robins based on a scoresheet that reclassified the kidnapping count to a life felony. Kidnapping is a first degree felony punishable by life. Where as here, the facts established that the defendant only vicariously possessed a firearm (i.e., the conviction was obtained on a principal theory), section 775.087(1), Florida Statutes does not allow for reclassification. The district court found that section 775.087(1) could be construed to require reclassification where the defendant has possessed the firearm vicariously. However, this interpretation ignores some basic rules of statutory construction. First, a plain reading of the statute suggests that "the defendant" must actually possess the firearm. Second, if this Court finds the statute ambiguous on this point, it must resolve doubt in favor of Robins, under the rule of lenity. Under the rule of lenity, the statute must be construed to require actual possession. This Court has already construed the minimum three year imprisonment provisions of section 775.087(2) to require actual possession. Likewise, as the second and third district courts of appeal have already done, this Court should require actual possession of the firearm for reclassification under section 775.087(1).

The trial judge erred reversibly in denying the defense motion for judgment of acquittal on the armed robbery count. The district court affirmed Robins's conviction, finding the evidence to have been clear that as a participant in the

criminal scheme of kidnapping, he was guilty as a principle to the robbery. However, this court should reverse because the evidence was legally insufficient to establish that Robins aided, abetted, or encouraged the co-perpetrator to commit a robbery. There was no evidence to establish that Robins had the specific intent to participate in a robbery. During the time that Robins was abducting McCullough, he did or said nothing to indicate he intended to rob her. Had Robins been engaged in a criminal scheme to rob McCullough, he would have committed an overt act in furtherance of the robbery. The facts do not exclude the reasonable hypothesis that the co-perpetrator acted on his own and, in fleeing the scene, decided to snatch McCullough's chains on the spur of the moment. Further, since there is no evidence concerning their motivations in kidnapping McCullough, there is no way to tell whether a robbery was a natural or probable consequence of this kidnapping.

ARGUMENT

I. SINCE ROBINS COULD ONLY HAVE VICARIOUSLY POSSESSED A FIREARM, THE RECLASSIFICATION PROVISION IN SECTION 775.087(1), FLORIDA STATUTES, IS INAPPLICABLE.

At trial, the state failed to establish facts to show that Robins had actual possession of a firearm. Some witnesses testified that the co-perpetrator was carrying a small gun. T.112. Hence the only way Robins could have been found guilty of using a firearm is under a principal theory, which the prosecutor urged the jury to apply. T.253. The jury found Robins guilty of armed kidnapping and the trial judge sentenced him based on a guidelines scoresheet that reclassified the kidnapping to a life felony. R.40.

Kidnapping is a first degree felony, punishable by life. § 787.01(2), Fla. Stat. (1989). However, the kidnapping count was scored as a life felony, (the primary offense), for 241 points. R.40. Had it been scored as a first degree felony punishable by life, the primary offense points would have been 181. Fla.R.Crim.P. 3.988(i). This would have given Robins a total score of 446 and placed him one cell lower in the sentencing guidelines. Id.

Section 775.087(1), Florida Statutes, provides for reclassification of a first degree felony to a life felony where a defendant "carries, displays, uses, threatens or attempts to use any weapon or firearm" during the commission of a felony. However, there was no evidence that Robins ever had actual possession of a weapon or firearm. Section 775.087(1)

does not provide for the reclassification, where as here, the defendant has been convicted of an armed offense under a principal theory.

In Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989), rev. denied, 548 So.2d 663 (Fla. 1989), the court held that "[a] plain reading of section 775.087(1) would be to require proof that Willingham actually carried or used a firearm during the course of the offense." Id. at 1242. (emphasis in original) Willingham has been followed by the third district court of appeal in Nagi v. State, 556 So.2d 1130, 1131 (Fla. 3d DCA 1989) and State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991).[2] Yet here, the district court disagreed and rejected "the Willingham requirement of actual physical possession of the firearm on the part of the defendant in all circumstances." Robins v. State, 587 So.2d 581 (Fla. 1st DCA 1991). Instead, the district court read section 775.087(1) in pari materia with section 777.011 (the principal statute) and found that

> when one is guilty as a principal in the commission of a criminal offense or

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[2]This Court has granted review and set oral argument for 6 March 1992 in Rodriguez, No. 77,859. In Rodriguez, the district court followed Willingham, but nonetheless certified the following question to this Court:

> Does the enhancement provision of subsection 775.087(1) Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a co-perpetrator.

Id. at 1191.

> offenses, if during the commission of that criminal scheme either he or his accomplice wields a weapon in furtherance of the criminal scheme, application of section 775.087(1) to enhance his offense is proper.

Id.

This Court should reject the analysis of the district court and reverse its decision. The district court's analysis ignores some basic principles of statutory construction. First, "[t]he best evidence of the intent of the legislature is generally the plain meaning on the statute." In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130,1137 (Fla. 1990). The statute provides for reclassification when "the defendant carries, displays uses . . . any weapon or firearm." § 775.087(1) Fla. Stat. (1989)(emphasis supplied). The statute does not mention a co-perpetrator's possession of a firearm nor does it imply that this would be sufficient for reclassification. Hence, a plain reading evinces the legislative intent that "the defendant" himself have actually possessed the firearm. Willingham, 541 So.2d at 1242.

Second, even if the statute were ambiguous, it must be construed in a manner most favorable to the defendant. § 775.021(1) Fla. Stat. (1989); See Perkins v. State, 576 So.2d 1310,1312 (Fla. 1991)("One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter.") Any doubt on the applicability of section 775.087(1) must be resolved in

Robins's favor under the rule of lenity. Consequently, this Court should reject the district court's contrary interpretation.

Further, this Court's decision in Earnest v. State, 351 So.2d 957 (Fla. 1977) supports a construction requiring actual possession. Earnest was convicted of armed robbery as a principal when a co-perpetrator actually possessed the firearm. Id. at 958. Pursuant to section 775.087(2)[3], the trial court sentenced Earnest to a three year minimum term of imprisonment and the district court affirmed finding the statute applicable to those found to have possessed a firearm vicariously. Id. However, this Court rejected the district court's analysis relying on the rule of lenity. Id. This Court stated: "the term 'possession' does not clearly encompass vicarious possession". Id. at 959. Hence, since section 775.087(1) does not contain the term "possession", it is even more clear that vicarious possession can not be read into the statute. See Postell v. State, 383 So.2d 1159,1162 (Fla. 3d DCA 1980).

Thus, this Court should quash the decision of the district court and order that it vacate the sentence and remand with

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[3]In relevant part, section 775.087(2), Florida Statues (1989) provides:

> Any person who is convicted of . . . [a]ny robbery . . . and who had in his possession a "firearm," . . . shall be sentenced to a minimum term of imprisonment of 3 calendar years.

directions that Robins be resentenced after a new scoresheet has been calculated which classifies the kidnapping count as a first degree felony punishable by life.

II. THE TRIAL COURT ERRED REVERSIBLY IN DENYING THE DEFENSE'S MOTION FOR JUDGEMENT OF ACQUITTAL ON THE ARMED ROBBERY COUNT, SINCE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT ROBINS WAS GUILTY AS A PRINCIPAL.

The co-perpetrator snatched the gold chains off McCullough's neck. T.36. However, the state charged Robins with armed robbery and argued that he was guilty under a principal theory. R.22;T.253. On appeal, Robins argued that the trial court erred in denying his motion for judgment of acquittal on the armed robbery count. The district court held "that the denial of the motion was proper because the evidence clearly supports a determination that, as a participant in a criminal scheme, [Robins] was a principal in that offense....." Robins v. State, 587 So.2d 581 (Fla. 1st DCA 1991). This holding is erroneous, however, and this Court should reverse the district court. Although Robins did not argue, in the jurisdictional brief, that this portion of the district court's opinion was in conflict, this Court should nonetheless exercise its discretion to review the issue raised here, in part II. See Savoie v. State, 422 So.2d 308 (Fla. 1982).

The trial court erred reversibly in denying the defense motion for judgment of acquittal on the armed robbery count since the evidence against Robins was legally insufficient to establish that he aided or abetted the co-perpetrator in taking McCullough's chains.

> In order to convict one of aiding and abetting in a crime, the State must establish: (1) that the defendant assisted the actual perpetrator by doing or saying

> something that caused, encouraged, assisted, or incited the perpetrator to actually commit the crime; and (2) that the defendant had the specific intent to participate in the crime.

Saffor v. State, 558 So.2d 69 (Fla. 1st DCA 1990), rev. denied, 570 So.2d 1306 (Fla. 1990). Viewed in the light most favorable to the state, the evidence fails to establish either of the two requirements, above.

There is no evidence that Robins assisted, caused or encouraged the co-perpetrator to take the gold chains. McCullough's testimony constituted the only evidence of robbery. Her testimony was confusing. McCullough testified that Robins and the co-perpetrator abducted her and were in the process of attacking her, when a gunshot went off that caused the men to stop. T.35. McCullough testified during cross-examination that the co-perpetrator snatched her chains just before the police arrived. T.42. However, she remembered testifying at her deposition that the robbery occurred after the police had arrived. T.42. Parker testified that he saw the co-perpetrator with McCullough while he was wrestling with Robins over the gun and that he fled when the police arrived. T.112. Since McCullough testified that the co-perpetrator snatched her chains and put them in his pocket right before he ran off, Robins was on the ground wrestling with Parker when the robbery occurred. T.34,36. It is difficult to see how Robins could have aided in the commission of the robbery if he was on the ground wrestling with Parker. At worst, Robins was merely present during the robbery. Yet, mere presence at the

scene of an offense is insufficient to establish participation. C.C.P. v. State, 479 So.2d 858 (Fla. 1st DCA 1985).

Moreover, there is no evidence to show that Robins and the co-perpetrator were engaged in a common plan or scheme to rob McCullough. To the contrary, if it was their plan to rob McCullough, they would have done something toward that goal much earlier. The two men did nothing when they initially abducted McCullough, at the first field or even at the second field, to suggest that it was their common plan to rob McCullough. Convictions on a principal theory have been affirmed when the state has introduced direct evidence that the defendant actively aided or participated in the planning of a crime. See Statten v. State, 519 So.2d 622 (Fla. 1988) (defendant present on numerous occasions when the robbery occurred and drove the getaway car); Hall v. State, 403 So.2d 1321 (Fla. 1981) (defendant planned the robbery and drove to scene with co-defendant). Here, there is no direct evidence that Robins and the co-perpetrator were working in concert to take McCullough's chains.

The evidence is insufficient to establish that Robins had the specific intent to participate in this robbery. Abducting McCullough is evidence of a crime, but it is also a circumstance which, in itself, fails to establish that Robins intended to take her chains. During the time that Robins was abducting McCullough, he did or said nothing to indicate he intended to rob her. As argued above, had Robins been engaged in a criminal scheme to rob McCullough, he would have committed

an overt act in furtherance of the robbery much earlier. The state's evidence of robbery was solely circumstantial and thus "proof must be not only consistent with guilt but inconsistent with any other reasonable hypothesis." Horton v. State, 442 So.2d 1064, 1066 (Fla. 1st DCA 1983); See also State v. Law, 559 So.2d 187 (Fla. 1989). The facts do not exclude the possibility that the co-perpetrator acted on his own and, in fleeing the scene, decided to snatch McCullough's chains on the spur of the moment. That is, the facts do not exclude the possibility that their original criminal scheme did not contemplate a robbery.

In Beasley v. State, 360 So.2d 1275 (Fla. 4th DCA 1978), the court held that an aider "is guilty of any other crime committed by the other person in pursuance of the common purpose or as a natural or probable consequence thereof." Id. at 1278. The evidence against Robins is that he participated in a kidnapping of McCullough. In the absence of more proof, a robbery should not be held to be a natural or probable consequence of a kidnapping. Since there is no evidence concerning their motivations in kidnapping McCullough, there is no way to tell whether a robbery was a natural or probable consequence of this kidnapping. See Parker v. State, 458 So.2d 750 (Fla. 1984), cert. denied, 470 U.S. 1088, 105 S.Ct. 1885, 85 L.Ed 2d 152 (1985). The facts here do not exclude the possibility that the co-perpetrator's actions were an independent act, not contemplated as a part of the original

criminal scheme, and thus not a natural or probable consequence.

This court should quash the district court's decision and direct that it remand to the trial court for entry of a judgment of acquittal on the armed robbery count.

CONCLUSION

Based on the foregoing argument, Robins requests that this Court quash the decision of the district court. This Court should direct the district court vacate Robins's sentence and remand to the trial court for resentencing with a new scoresheet which would score the armed kidnapping as a first degree felony punishable by life. This Court should also direct the district court reverse Robins's conviction for armed robbery and remand to the trial court for entry of a judgment of acquittal.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been hand delivered to Assistant Attorney General Sara D. Baggett in Tallahassee, Florida on 17 February 1992.

Respectfully submitted,

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