IN THE SUPREME COURT OF FLORIDA

RICHARD TONY ROBERTSON,

Appellant,

v.

Case No. 81,324

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

The State produced sufficient evidence for the jury to find that Robertson entered the victim's apartment unlawfully and committed an offense therein. Even assuming that the victim consented to Robertson's entry, consent was withdrawn when he attacked her, and Robertson committed burglary by remaining in the apartment. Because the burglary conviction is supported by competent substantial evidence, the felony murder/burglary aggravator was established beyond a reasonable doubt and properly found by the trial court. Robertson's burglary conviction and death sentence should be affirmed.

ARGUMENT

Issue

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT ROBERTSON'S CONVICTION OF BURGLARY WITH AN ASSAULT AND THE TRIAL COURT'S FINDING FELONY MURDER/BURGLARY IN AGGRAVATION.

After oral argument in this case, this Court ordered the parties "to file supplemental briefs addressing the sufficiency of the evidence to support 1) the burglary with assault conviction and 2) the committed during the course of a burglary aggravator. The briefs should focus on the issue of consent." Thereafter, Robertson filed his supplemental brief, arguing that the evidence was insufficient to support his burglary conviction and the felony-murder aggravator and that his death sentence should be reduced. Contrary to these contentions, however, the record shows that the jury properly convicted Robertson of burglary and that the trial court correctly used that conviction to aggravate Robertson's sentence.

"Burglary" is defined as "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." § 810.02(1), Fla. Stat. (1995). Robertson moved for judgment of

acquittal on all counts after the state rested its case. As to the first count, first-degree murder, he argued that he and the victim were "just kind of playing" (T 863) and that the victim's murder was "basically an accident." (T 864). On the burglary with assault charge he argued "that there is absolutely no evidence whatsoever before this jury that there was any kind of a forced entry, that he was there with anything but the victim's consent, or that he was ever told to leave or that she ever expressed a desire for him to leave" and that "there is no indication at all as to what his intent was when he entered." (T 864). The prosecutor argued that no reasonable person could believe that Robertson did not intend to kill the victim (T 869) and that there was no evidence that the victim consented to having the gag forced down her throat. (T 870). The prosecutor noted that, if one gains entrance to a dwelling or remains inside with the intent to commit an offense, a burglary is committed because the statute says "enter or remain." (T 871). After hearing the parties, the court denied Robertson's motion on all counts and commented that the state "has established a prima facie case and the matters are a question for the jury." (T 877).

Moving for a judgment of acquittal "admits not only the facts in the evidence adduced, but also admits every conclusion favorable

to the adverse party that a jury might fairly and reasonable infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). The trial court's review of the evidence on a motion for judgment of acquittal must be "in the light most favorable to the state." State v. Law, 559 So.2d 187, 189 (Fla. 1989). The state does not have to rebut every possible sequence of events; rather, it only has to introduce evidence that is inconsistent with a defendant's version of what happened. Barwick v. State, 660 So.2d 685 (Fla. 1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 114 S.Ct. 1578, 128 L.Ed.2d 1038 (1994); Law. If the state does this, the case should be presented to the jury: "Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from concealed facts, the Court should submit the case to the jury." Lynch, 293 So.2d at 45; Barwick; Taylor v. State, 583 So.2d 323 (Fla. 1991). Moreover, the jury does not have to believe the defense version of the facts. Taylor; Cochran v. State, 547 So.2d 928 (Fla. 1989).

As the trial court held, the state presented sufficient evidence to withstand the motion for judgment of acquittal. That evidence also proved that Robertson committed a burglary with an

assault. Robertson claimed at trial that the victim voluntarily allowed him to enter her apartment and argues that "the state's evidence was consistent with Robertson's version of what happened." (Supplemental brief at 4). Contrary to that statement, however, there was sufficient evidence to support the state's contention that Robertson entered the victim's apartment unlawfully.

A neighbor of the victim said she saw Robertson enter the victim's apartment a few days before Wednesday, August 28. (T 753-54). Another neighbor, however, saw Robertson run up to the victim on Monday or Tuesday and grab her arm and heard the victim tell him to leave her alone and not to touch her. (T 778-79). In his statements to the police, Robertson claimed that the victim allowed him into the apartment. In two of these statements, however, he also said that the victim slammed the door in his face because he was intoxicated. (Defendant's exhibit #2 at 10; defendant's exhibit #3 at 5). When asked if Robertson's entry into the victim's apartment was consensual, Detective Springer responded: "No, sir. It was my understanding that she had slammed the door in his face and told him to stay away" and that Robertson "had to hedge into the door to keep the door from being shut." (T 837). If, as he claims, Robertson was more intoxicated by alcohol and drugs when he returned later in the evening than he had been

earlier, it is inconceivable and totally beyond belief that the victim would have admitted him to her apartment after earlier slamming the door in his face when he was less intoxicated. Thus, the jury reasonably could have found an unlawful entry.

Consent to entry is an affirmative defense to a charge of burglary. State v. Hicks, 421 So.2d 510 (Fla. 1982). Even if, by some stretch of the imagination, Robertson's claim of consent could be believed, the victim's consent to his remaining in her home, especially after he attacked her, cannot be assumed. Unfortunately, the victim cannot tell us what happened because Robertson killed her. Circumstantial evidence, however, can be used to prove burglary. Baker v. State, 636 So.2d 1342 (Fla. 1994); Bundy v. State, 455 So.2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986).

Robertson claimed that, after the victim admitted him to her apartment, he and the victim were just playing and that she allowed him to tie her arms behind her back, both with a piece of clothing and with an electrical cord. The evidence, however, does not provide as much support for this contention as Robertson claims. Although the kitchen and closet of the victim's apartment were neat, the bedroom was in disarray with an overturned box of scattered items and a pile of clothes on the floor. (T 709-10).

The jury could have found this to be consistent, rather than as Robertson assumes inconsistent, with a struggle. In one of his statements, Robertson said that he blindfolded the victim so that she could not see what he was doing. (Defendant's exhibit #5 at 3). Thus, the jury could have concluded that Robertson did not want the victim watching while he brutalized and killed her. When asked if he gagged the victim, Robertson responded: "I remember before I got off before we started really playing I had to put something over her mouth." (Defendant's exhibit #5 at 4). The jury reasonably could have found that Robertson gagged the victim to prevent her crying out and attracting help. The medical examiner testified that the gag had been stuffed in the victim's mouth and down her throat with a great deal of force (T 721) and that the gag could have caused death if she had not been strangled. (T 723). Even if the victim consented to Robertson entering her apartment, a doubtful assumption at best, the evidence supports the jury's finding that she revoked any consent when Robertson attacked her and that his remaining in the apartment was unlawful.

Robertson argues that this Court should adopt a lower New York appellate opinion and hold that no burglary occurred in this case. In People v. Hutchinson, 477 N.Y.S. 2d 965 (N.Y. Sup. Ct. 1984), aff'd 503 N.Y.S. 2d 702 (N.Y. 1986), the victim allowed Hutchinson

into her dormitory room so that he could leave a note for someone that the state proved did not exist. When she let him enter again so that he could revise the note, Hutchinson accosted her with a knife, and she ordered him to leave. Hutchinson then stabbed the victim and fled. 477 N.Y.S. 2d at 966.

In discussing consent as a defense to burglary of public premises, the court stated that revocation of consent "occurs only after the building is closed to the public or there is a direct and personal order to leave." Id. at 968. When private premises are involved, however, the court held that "the fact that [Hutchinson] was unwelcome after he pulled the knife does not convert his licensed entry into an unlawful remaining. His licensed presence there is not revoked by the commission of a criminal act." Id. In other words, "there must be something more to establish termination of license than the commission of a criminal act or an order to leave after a criminal intention is manifested." Id. One must wonder what the "something more" might be if the commission of a crime or an order to get out is insufficient to revoke consent to enter.

Apparently unlike New York's, Florida's burglary statute focuses on the safety of people and property. Toole v. State, 472 So.2d 1174 (Fla. 1985). Thus, Florida courts considering the issue

of consent in burglary charges have not reached the absurd conclusion that the New York court did in Hutchinson. In Routly v. State, 440 So.2d 1257 (Fla. 1983), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984), Routly argued that he should not have been convicted of burglary because he legally entered his victim's home. This Court disagreed, however, because Routly remained in the home with the intent to commit an offense, thus satisfying the burglary statute.

Routly was discussed in Ray v. State, 522 So.2d 963 (Fla. 3d DCA), review denied, 531 So.2d 168 (Fla. 1988). As a prelude to surveying how other jurisdictions had addressed the issue of remaining after consent to enter had been withdrawn, the district court commented: "It is undeniably true that a person would not ordinarily tolerate another person remaining in the premises and committing a crime, and that when a victim becomes aware of the commission of a crime, the victim implicitly withdraws consent to the perpetrator's remaining in the premises." Id. at 966. In Jennings v. State, 612 So.2d 631, 632 (Fla. 3d DCA 1993), the court relied on Ray and concluded: "The proofs adduced at trial established that whatever consent the defendant had to enter the subject pawnshop was implicitly withdrawn when the defendant participated in committing an attempted armed robbery therein,

which, in turn, led to the commission of other crimes, including a murder and false imprisonment." See also Thorpe v. State, 559 So.2d 1285 (Fla. 2d DCA 1990); Gentry v. State, 595 So.2d 548 (Ala. Ct. Crim. App. 1985); Johnson v. State, 473 So.2d 607 (Ala. Ct. Crim. App. 1985); State v. Gelormino, 590 A.2d 480 (Conn. Ct. App. 1991); Hambrick v. State, 330 S.E.2d 383 (Ga. 1985); People v. Racanelli, 476 N.E.2d 1179 (Ill. Ct. App. 1985); People v. Fisher, 404 N.E.2d 859 (Ill. Ct. App. 1980); State v. Mogenson, 701 P.2d 1339 (Kan. Ct. App. 1985); State v. Bunch, 510 So.2d 1266 (La. Ct. App. 1987); State v. Steffen, 509 N.W.2d 383 (Ohio 1987); State v. Bradley, 752 P.2d 874 (Utah 1988); State v. Collins, 751 P.2d 837 (Wash. 1988); State v. Karow, 453 N.W. 2d 181 (Wis. Ct. App. 1990).

Reviewing the sufficiency of the evidence "does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citation omitted, emphasis in original). This Court adopted the Jackson standard in Melendez v. State, 498 So.2d 1258 (Fla. 1986). As in Melendez, the rational

trier of fact in this case, the jury, made a decision that is supported by competent substantial evidence. As was its right and duty, the jury resolved any inconsistencies in that evidence. On appeal a reviewing court's concern "must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) (footnote omitted). As this Court has recognized: "It is not the province of this Court to reweigh conflicting testimony." Melendez, 498 So.2d at 1261; Tibbs.

Robertson argues that the jury could convict him of burglary only by improperly pyramiding inferences. (Supplemental brief at 13). To the contrary, as shown above, the jury only resolved the inconsistencies in the evidence. To that end, it properly could draw inferences from the evidence. Robertson has failed to show an improper pyramiding, however.

As the Ray court stated: "Just as the consent defense must be given meaning, so must the 'remaining in' alternative." 522 So.2d at 967. Even assuming that Robertson proved that the victim allowed him to enter her apartment, he did not prove that the

victim consented to his killing her; rather, he blithely assumes that she consented to his doing so. The state, on the other hand, produced competent substantial evidence from which the jury could conclude that, even if the victim consented to Robertson's entering her apartment, she withdrew that consent when he attacked her, and, thereafter, he remained in the apartment unlawfully, thereby committing a burglary. The evidence is sufficient to support Robertson's conviction of burglary with an assault, and that conviction should be affirmed.

The trial court stated the following in regard to the felony murder/burglary aggravator:

> The existence of this aggravating circumstance was confirmed by the verdict of the Jury in the guilt-innocence phase of the trial when the Defendant was found guilty of burglary of a dwelling-person assaulted, in addition to First Degree Murder. Brown v. State, 473 So.2d 1260 (Fla. 1986); Mills v. State, 476 So.2d 172 (Fla. 1986); Lowenfield v. Phelps, 108 S.Ct. 546 (1989). The evidence was clear as to the applicability of this aggravating circumstance, the Jury was instructed with regard to it, and the Court finds that is was proven beyond a reasonable doubt.

(R 230). As demonstrated above, the evidence is sufficient to support the burglary conviction. That conviction proves beyond a reasonable doubt the felony murder/burglary aggravator, and the trial court's finding should be affirmed.

CONCLUSION

The evidence is sufficient to support the burglary conviction and that conviction and the felony murder aggravator should be affirmed. Contrary to Robertson's contention, two strong aggravators support Robertson's death sentence and that sentence should also be affirmed.

Respectfully submitted,

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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 Ms. Nada Carey, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida, 32301, this 5th day of March, 1996.

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