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 REPLY BRIEF OF APPELLANT

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Supplemental Reply Brief of Appellant

Argument

1. In his statements, Robertson said he visited the victim around 8:30 p.m. the night of the murder, but she would not let him in because she knew he was intoxicated. He also said when he returned to Fuce's apartment later that evening, Fuce let him in, saying, "Tony, you look pretty messed up." Defendant's Exhibit 4 at 3. The state has contended the jury reasonably could have found an unlawful entry because "[i]f, 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." State's Answer Brief at 5-6.

It is not inconceivable that Fuce let Robertson in when he came back later. There is plenty of evidence indicating Fuce had befriended Robertson. Fuce may have taken pity on Robertson and invited him in to talk, as he said. There is no evidence to refute that possibility, and the state's bare assertion that it did not happen that way does not meet the beyond a reasonable doubt standard of proof.

2. The state has labeled the result in People v. Hutchinson, 124 Misc.2d 487, 477 N.Y.S.2d 965 (Sup. Ct. 1984), aff'd, 121 A.D.2d 849, 503 N.Y.S.2d 702 (App. Div.), appeal denied, 68 N.Y.2d 770, 498 N.E.2d 156, 506 N.Y.S.2d 1054 (1986), "absurd." The state seems to believe that Hutchinson holds an occupant's invitation to enter, where the invitee later attacks the occupant, is equivalent to consent to being attacked or even killed. See State's Supplemental Answer Brief at 11-12 ("Even assuming 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 issue, however, is not whether an occupant has agreed to being attacked, but whether the attacker is on the premises by invitation, or by intrusion, when the attack takes place. What Hutchinson holds is that in order for a charge of

burglary to be sustained, the two elements of burglary, trespass and intent to commit an offense, must exist as separate and distinct elements. In order for the trespassory element to exist as a separate and distinct element where the initial entry is by invitation, there must be evidence the occupant communicated a withdrawal of consent before any criminal attack. Just as the "remaining in" alternative must be given meaning, so must the consent defense. Under the state's interpretation of the statute, the consent defense would be superfluous whenever a crime is committed indoors, despite a defendant's unqualified authorization to be on the premises.

3. The issue posed by the present case was not addressed in Routly v. State, 440 So. 2d 1257 (Fla. 1983). In Routly, the homeowner's houseguest let Routly inside while the owner was not there. When the owner returned, Routly pretended to leave, but instead went into a back room, from where he later emerged and attacked the owner. The issue in Routly was simply whether unlawful entry is a requisite element of burglary. The Court held unlawful entry was not a required element. In Routly, the defendant "remained in" by subterfuge, so the Court never addressed the situation here, where there is no evidence of entry or remaining in by subterfuge, and an invited guest has

spontaneously attacked the occupant.

4. The state has cited a slew of cases purportly in accord with the rule applied in Ray v. State, 522 So. 2d 963 (Fla. 3d DCA), review denied, 531 So. 2d 168 (Fla. 1988).[1] In most of these cases, the defendant, a stranger to the victim, obtained entry by subterfuge. In these cases, therefore, the entry itself was unauthorized, and any language suggesting an occupant's withdrawal of consent can be inferred solely from the circumstances of the crime is dicta. See Johnson v. State, 473 So. 2d 607 (Ala. Crim. App. 1985)(defendant murdered 82-year-old victim after she opened door to defendant, who entered on pretext of using phone); People v. Fisher, 83 Ill. App. 3d 619, 404 N.E.2d 859 (1985)(entry gained by misrepresentation and subterfuge); State v. Bunch, 510 So. 2d 1266 (La. Ct. App. 1987)(93-year-old victim let defendant in to use phone); State v. Collins, 110 Wash. 2d 253, 751 P.2d 837 (1988)(after obtaining permission to enter premises to use phone, defendant assaulted female occupants); State v. Karow, 154 Wis. 2d 375, 453 N.W.2d 181 (Ct. App. 1990)(defendant killed victim after obtaining entry by claiming to be seeking phone number), review denied, 457

[1]Appellant cited some of these cases in his initial brief as well.

N.W.2d 323 (Wis. 1990); see also State v. Steffen, 509 N.E.2d 383 (Ohio 1987)(occupant murdered after she allowed defendant, a salesman, to enter her home to give demonstration), cert. denied, 485 U.S. 916, 108 S.Ct. 1089, 99 L.Ed.2d 250 (1988).

In one case, even though the defendant and victim were not strangers, there was sufficient evidence from which the jury could have inferred the defendant had the intent to commit a felony prior to entry and obtained the victim's consent to entry by subterfuge. See State v. Bradley, 752 P.2d 874 (Utah 1988)(three men entered victim's house and pulled guns after defendant opened door because he needed signature on some social security papers).

In State v. Morgenson, 10 Kan. App. 2d 470, 701 P.2d 1339 (1985), the evidence was conflicting as to whether the defendant's entry was consensual. It was undisputed, however, that the victim, upon discovery of defendant's entry, demanded that he leave. This case is factually inapposite, therefore, as the victim revoked any consent to enter or remain prior to any manifestation of a criminal intent. Thus, the two elements of burglary, unauthorized entry (or remaining in) and intent to commit a crime, existed as separate and distinct elements. Despite this significant factual distinction between Morgenson

and Ray, the court in Ray read Morgenson as confronting "our precise problem." 522 So. 2d at 967.

Also factually inapposite is State v. Gelormino, 24 Conn. App. 563, 590 A.2d 480, cert. denied, 219 Conn. 911, 593 A.2d 136 (1991). In Gelormino, the defendant walked into an open door to recover stolen goods and beat up the oocupant. Thus, there was no clear evidence the victim ever initially consented to the defendant's entry.

The only cases factually similar to Ray, in which the Ray rule has been applied are Gentry v. State, 595 So. 2d 548 (Ala. Crim. App. 1985), cert. denied (1992), Hambrick v. State, 174 Ga. App. 444, 330 S.E.2d 383 (1985), and People v. Racanelli, 132 Ill. App. 3d 124, 476 N.E.2d 1179, appeal denied (1985).

In upholding Gentry's burglary conviction, the court cited three earlier cases, Minshew v. State, 542 So. 2d 307 (Ala. Cr. App. 1988), Moss v. State, 536 So. 2d 129 (Ala. Cr. App. 1988), and Johnson v. State, 473 So. 2d 607 (Ala. Cr. App. 1985), for the proposition "that the fact that the victim terminated the defendant's license or privilege to remain on the premises can be inferred where a struggle took place and the victim was beaten."

595 So. 2d at 551.[2] The Gentry court's reliance on its prior cases was misplaced, however, as none of the earlier cases involved an authorized entry. As noted above, in Johnson, where the defendant murdered an 82-year-old woman, the defendant obtained consent to enter on the pretext of using the phone. In Moss, although the victim and defendant knew each other, "there was evidence from which the jury could reasonably infer that Moss went to the victim's house prepared to commit a crime and that Moss wore a mask and hood and was armed when he killed the victim." There also was evidence of a violent struggle during which both the victim and Moss shot each other. In Minshew, where the defendant was convicted of burglarizing his mother-in-law's house, the mother-in-law testified that she heard the defendant pounding on her daughter's car and when she cracked the door to see what was going on, the defendant pushed the door open and forced his way inside.[3]

The court in Racanelli similarly relied on a factually inapposite case in upholding a burglary conviction where the only

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[2]The court also quoted Ray with approval.

[3]In a later Alabama case, Weaver v. State, 564 So. 2d 1007 (Ala. Cr. App. 1989), the court recited the Ray rule where the defendant obtained entry by kicking the door in after the occupants refused to let him in (the occupants also ordered him to leave after he got inside).

evidence of unauthorized remaining in was the crime itself. As the dissenting judge pointed out, the majority "necessarily resorted to phantasmagoric rationale to affirm the burglary" conviction:

> The majority holds that "Defendants' entry into the victim's apartment, although initially with the victim's authority, exceeded that authority when they attacked the victim and removed his property. . . . Therefore, defendants' presence in the apartment was without authority once they attacked the victim and removed his belongings from the apartment." The majority magically concludes that the defendants entered Reynolds' apartment without authority and that, therefore, the defendants were proven guilty beyond a reasonable doubt of burglary and home invasion.
>
> The majority's reliance on People v. Hudson (1983), 113 Ill.App.3d 1041, 69 Ill.Dec. 718, 448 N.E.2d 178, is misplaced. Hudson relied on People v. Fisher (1980), 83 Ill.App.3d 619, 623, 39 Ill.Dec. 268, 404 N.E.2d 859, as authority. The court pointed out in Fisher (which also occurred in Hudson) that "Defendants' entry that evening was gained as a result of misrepresentation and subterfuge. . . . [The residents] were deceived into allowing defendants into their apartment, and such entry was not in accordance with the will of the occupants and is therefore unauthorized." The court concluded in Hudson and Fisher that even though the entry into the apartment was initially by invitation, because such invitation was obtained by subterfuge, the entry was without authority. Also in Hudson and Fisher, it was promptly after the

> defendants' surreptitiously induced the invitation into the apartment that the defendants threatened the residents with firearms and ransacked the premises. In the instant case, Reynolds was not deceived into allowing defendants into his apartment. The entry into Reynolds' dwelling was not gained surreptitiously by misrepresentation or subterfuge, nor was Reynolds' invitation induced by Racanelli or Watters. In Hudson and Fisher, the defendants planned to rob the owners before they entered the premises. They deceived the owners into extending them an invitation into the dwelling in order to accomplish their purpose. Such are not the facts in the instant case. Hudson and Fisher are therefore grossly inapposite to the instant case.

476 N.E.2d at 1199(Pincham, J., dissenting).

Thus, it appears that although a number of courts have given lip service to the Ray rule, the rule often has been recited as dicta in cases where entry was obtained unlawfully through fraud. Less than a handful of courts have upheld burglary convictions where there was no evidence negating the defendant's unqualified consent to enter, and there was no evidence of any withdrawal of consent other than the circumstances of the crime itself. See Gentry; Ray; Hambrick; Racanelli.

5. This Court should disapprove Ray. Neither the language nor the purpose of Florida's burglary statute encompasses the situation where an invited guest spontaneously attacks his or her

host. Florida's burglary statute, like that of most states, including New York, was designed to prevent and punish "intruders," not invitees. As the Louisiana Supreme Court explained in State v. Lozier, 375 So. 2d 1333, 1336-37 (La. 1979):

> The significance of the consent of the occupant in a burglary offense grows out of the rationale behind burglary statutes that a man's home is his castle. (2 Blackstone Commentaries (Jones ed., 1916). Burglary laws are not designed primarily to protect the inhabitant from unlawful trespass and/or the intended crime, but to forestall the germination of a situation dangerous to the personal safety of the occupants. . .
>
> In the archetypal burglary an occupant of a dwelling is startled by an intruder who may inflict serious harm on the occupant in his attempt to commit the crime or to escape from the house. The frightened occupant, not knowing whether the intruder is bent on murder, theft, or rape, may in panic or anger react violently, causing the burglar to retaliate with deadly force. This violent scenario is far less likely to unfold where the intruder with felonious intent is known to the occupant and has expressed or implied consent to be on the premises. Thus, in Dunn, supra, a thief's entry into a business during business hours with the intent to steal did not in itself provoke the defensive reaction of the occupant or owner that may have led to further violence to the occupant or bystanders. Similarly where an employee or friend is on the premises with the consent, express or implied, of an occupant, the discovery of the crime is far less likely to provoke the violence that the burglary

statute is designed to discourage.

(emphasis added).

Regardless of whether a defendant is charged with unlawful entry or unlawful remaining in, the lack of authority for the intrusion must be determined as a distinct element, separate and apart from the intent to commit a crime. In the present case, there was insufficient evidence to establish an unlawful intrusion, separate and apart from the intent to commit a crime. Accordingly, there was insufficient evidence to sustain both the burglary with assault conviction, and the aggravating circumstance that the homicide was committed during a burglary.

Conclusion

For the reasons expressed in this and the supplemental brief, appellant respectfully asks this Court to vacate his burglary with assault conviction, vacate his death sentence, and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Barbara J. Yates, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, RICHARD TONY ROBERTSON, # 570477, Union Correctonal Institution, Post Office Box 221, Raiford, Florida 32083, on this 25th day of March, 1996.

Nada M Carey

NADA M. CAREY