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 BRIEF OF APPELLANT

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Supplemental Brief of Appellant

Preliminary Statement

This supplemental brief is filed in response to this Court's order dated January 30, 1996, directing the parties to address the sufficiency of the evidence to support the burglary with assault conviction and the committed during the course of a burglary aggravator, focusing on the issue of consent.

Summary of Argument

Because the state failed to rebut Robertson's defense that he was invited into Fuce's apartment the night of the homicide, the issue in this case is whether withdrawal of that invitation can be inferred from the circumstances of the crime, sufficient to sustain a charge of burglary. Some courts, including the Third District in Ray v. State, 522 So. 2d 963 (Fla. 3d DCA),

review denied, 531 So. 2d 168 (Fla. 1988), have held withdrawal of consent to enter or remain can be inferred from an occupant's resistance to a criminal act, sufficient to sustain a burglary charge. Other courts have simply held that an invitation to enter necessarily is limited to lawful activity. Other courts have rejected both of these rationales, concluding such presumptions improperly merge the trespassory aspect of burglary with the intent element; lead to absurd results; and impermissibly broaden the scope of liability for burglary, making any crime committed indoors a burglary.

Appellant urges this Court to reject the legal fictions that allow a jury to infer withdrawal of consent or limitation of consent from the commission of a crime. Such presumption effectively eliminates the trespassory aspect of burglary, making any crime committed indoors a burglary, an effect not intended by the Legislature. Such a presumption also allows the state to prove nonconsent by proof of another element of the crime, criminal intent, thereby nullifying the defense of consent.

In the alternative, even if this Court approves the theory of implicit withdrawal of consent applied in Ray, the charge of burglary cannot be sustained in the present case as there was no evidence the victim resisted Robertson's assault.

Because the burglary conviction cannot be sustained, the committed during a burglary aggravator is invalid. The elimination of this aggravating circumstance leaves either one or no aggravating circumstances, depending on whether this Court strikes the heinous, atrocious, or cruel aggravator. In light of the substantial mitigating evidence in this case, death is not proportionate.

Argument

Issue Presented

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT BOTH APPELLANT'S CONVICTION OF BURGLARY WITH ASSAULT AND THE COMMITTED DURING A BURGLARY AGGRAVATOR, WHERE THE CIRCUMSTANCES WERE CONSISTENT WITH A CONSENSUAL ENTRY AND THERE WAS NO EVIDENCE INDICATING CONSENT TO REMAIN WAS WITHDRAWN.

A. This Court should hold that a person who initially enters a dwelling with consent and commits a crime therein may not be convicted of burglary unless there is evidence independent of the commission of the crime from which a withdrawal of consent can be inferred.

In Florida, burglary is defined as "entering or remaining in a structure or 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." s. 810.02, Fla. Stat. (1993). Lack of consent to enter or remain is

an affirmative defense. State v. Hicks, 421 So. 2d 510 (Fla. 1982).[1]

Here, the evidence clearly was insufficient to support the burglary charge based upon an uninvited entry. Robertson said he knocked on Fuce's door and she let him in, and the state presented no evidence to the contrary. Although the state theorized that Fuce opened the door and Robertson pushed his way inside, there was no evidence to support this theory. In fact, the state's evidence was consistent with Robertson's version of what happened. Crime scene investigators said there was no sign of forced entry and no sign of a struggle inside the apartment. Several persons testified they had seen Robertson and Fuce together, amicably, in the days prior to the homicide. Although one witness testified Robertson and Fuce argued several days before the murder, another witness testified that on the day of the homicide, Robertson and Fuce walked into Fuce's apartment, apparently on friendly terms, and Robertson came back out about 15 minutes later. The evidence therefore was insufficient to

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[1]The defendant has the burden of going forward with evidence of consent. Once the defendant has presented competent evidence of the existence of the defense, the burden of proof remains with the state, and the state must then prove the nonexistence of the defense beyond a reasonable doubt. Wright v. State, 442 So. 2d 1058 (1st DCA 1983), review denied, 450 So. 2d 489 (Fla. 1984).

support the burglary charge based upon a nonconsensual entry.

The issue then is whether the evidence was sufficient to establish beyond a reasonable doubt that Fuce's invitation to enter was later withdrawn, making Robertson's subsequent "remaining in" a burglary. Since there was no evidence of any explicit withdrawal of consent, the question is whether an implicit withdrawal of consent can be inferred solely from the commission of the crime itself.

This issue was squarely addressed 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 (1986), in which the court concluded that neither the manifestation of criminal intent nor the commission of a criminal act, in and of itself, converts a lawful consensual entry into an unlawful nonconsensual remaining, sufficient to sustain a burglary charge. In Hutchinson, the victim admitted the defendant into her apartment/dorm building and provided him with pen and paper to write a note. The victim admitted the defendant again to use the bathroom. She admitted the defendant a third time when he came to retrieve the note to change the phone number on it. This time, he accosted the victim with a knife. She ordered him to leave, after which a struggle ensued during which the victim was stabbed.

The court in Hutchinson rejected the presumption that because nobody consents to criminal acts on his or her premises, once a person engages in criminal behavior, consent is revoked. The court reasoned that to apply such presumption improperly merges the trespassory aspect of burglary with the intent element:

> This reasoning impermissibly broadens the scope of liability for burglary, making a burglar of anyone who commits a crime on someone else's premises. It erroneously merges two separate and independent elements that must coexist to establish burglary: First, the trespassory element of entry or remaining without license or privilege; Second, intent to commit a crime. An intrusion without license or privilege is the distinguishing element, the essence of burglary. It must be established separate and distinct from the intention to commit a crime. The mere fact that a crime was committed or was intended is an insufficient basis for finding that the entry or remaining was without privilege or authority.

477 N.Y.S.2d at 967.

The court made clear it was not saying "that one who initially enters private premises with consent never remains unlawfully so as to incur liability for burglary," but only that 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. at 968; see also State v. Harper, 785 P.2d 1341 (Kan. 1990); State v. Collins, 737 P.2d

1050 (Wash. Ct. App. 1987), modified, 110 Wash. 2d 253, 751 P.2d 837 (1988).

Other courts have reached different conclusions, including the court in Ray v. State, 522 So. 2d 963 (Fla. 3d DCA), review denied, 531 So. 2d 168 (Fla. 1988).[2] In Ray, the victim invited Ray into her home and they talked. Ray left, came back, and the victim let him in again. Ray accosted the victim from behind and tried to force her to have sex with him. She fought him off. Ray was convicted of burglary of a dwelling with intent to commit an assault.[3]

In addressing Ray's challenge to the burglary conviction, the district court posed the issue to be addressed as follows:

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[2]This Court has not addressed this issue. In Routly v. State, 440 So. 2d 1257 (Fla. 1983), a capital case, the defendant made a consensual entry into the victim's dwelling, then "feigned a departure out the back door." Id. at 1260. Thereafter he robbed the victim and eventually killed him. In support of the committed during a burglary aggravator, the trial court concluded "[t]he entering was without legal right or authority and was with the intent to commit theft and therefore amounted to a burglary." Id. at 1262. On appeal, Routly argued he did not commit burglary because he legally entered the home. The Court rejected this argument, stating the "burglary statute is satisfied when the defendant "remains in" a structure with the intent to commit an offense therein," and, hence, "unlawful entry is not a requisite element." Id. The Court noted further that the record supported a finding that Routly committed a robbery and even if the elements of robbery and burglary had not been met, Routly conceded his commission of a kidnapping, and the other offenses were thus "mere surplusage." Id.

Routly did not address the precise issue here, therefore, as Routly did not dispute that he remained on the premises surreptitiously and without the owner's consent. Cf. Howard v. State, 400 So. 2d 1329 (Fla. 4th DCA 1981)(entry by trick supports burglary conviction).

[3]Ray was acquitted of the charges of attempted first-degree murder and and attempted sexual battery.

> Since, as the State concedes, the evidence is undisputed that Ms. Bryant consented to Ray's *entering* the premises, the issue we must address is whether the evidence supports the jury's necessary, albeit implicit, finding that Bryant's consent to Ray's *remaining in* the premises was withdrawn. Otherwise stated, once consensual entry is complete, a consensual "remaining in" begins, and any burglary conviction must be bottomed on proof that consent to "remaining in" has been withdrawn.

522 So. 2d at 965.

In upholding the burglary conviction, the district court began with the premise 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. The court concluded Bryant's physical and verbal resistance to the assault indicated her withdrawal of consent, making Ray's remaining on the premises thereafter a burglary. Id. at 967. Other courts have embraced the implied withdrawal of consent rationale. See Hambrick v. State, 330 S.E.2d 383 (Ga. Ct. App. 1985)(although defendant had authority to enter, when defendant's ulterior purpose became known to victim and victim reacted against it, a reasonable inference could be drawn that authority to remain ended); Johnson v. State, 473 So. 2d 607 (Ala. Ct. App. 1985)(occupant's consent terminated when defendant knows or has reason to know occupant no longer wants defendant to remain;

termination of consent can be inferred from circumstances of brutal murder where there were obvious signs of struggle and victim severely beaten); People v. Racanelli, 476 N.E.2d 1179 (Ill. Ct. App. 1985)(attack on victim and removal of his property sufficient evidence that consent withdrawn, making subsequent remaining in unlawful).

Other courts have reached the same result based upon the theory that any consent to entry necessarily is limited to lawful activity. E.g. People v. Fisher, 404 N.E.2d 859 (Ill. App. Ct. 1980)(invitation into apartment for social visit did not authorize concealed criminal purposes for which invitees actually came); State v. Bradley, 752 P.2d 874 (Utah 1988)(consent was to defendant's entry for lawful purpose and did not authorize subsequent assault).[4]

Appellant urges this Court to reject these legal fictions, which permit the trespassory aspect of a burglary to be unrebuttably presumed from the manifestation of the intent to commit a crime in the dwelling. Although Florida, like most jurisdictions, has eliminated the "breaking" requirement from its

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[4]Other cases addressing this issue can be found in Annotation, Maintainability of Burglary Charge, Where Entry Into Building is Made with Consent, 58 A.L.R.4th 335 (1987 & Supp. 1995).

burglary statute, the entry or remaining in must still be unlawful, or nonconsensual, thus retaining the trespassory aspect of common-law burglary. Ray, 522 So. 2d at 964 n.3. This is in contrast to those jurisdictions, such as California, where consent is not a defense, and the only elements of the crime are unlawful intent and entry. Id.

Allowing a jury to infer withdrawal of consent, or that an invitee necessarily has exceeded the scope of consent, solely from the commission of a crime in effect nullifies the trespassory aspect of the crime and deprives a defendant of the statutory defense of consent. Permitting such a presumption would mean that regardless of the occupant's actual consent to enter, once the necessary criminal intent is demonstrated, the affirmative defense of consent is meaningless.

Such an interpretation also would mean that any crime committed indoors would constitute some degree of burglary. The Legislature does not appear to have intended such a broad result. Moreover, such an interpretation would render meaningless the clause "unless . . . the defendant is licensed or invited to enter or remain."

B. Even if withdrawal of consent can be inferred from the victim's resistance to a manifested intent to commit a crime, the evidence in the present case was

insufficient to support such an inference as there was no evidence the victim resisted the attack or was aware of her impending death.

The court in Ray hinged its decision upholding the defendant's burglary with assault conviction on the undisputed evidence that the victim physically and verbally resisted the defendant's attempted sexual assault. Here, in contrast, there was no evidence the victim resisted the acts that resulted in her death. Robertson told the police that after Fuce let him in her apartment, they talked. They began horsing around and she let him tie her up. He put his arms around her neck and as soon as his "medication moved in" on him, his hands got tighter and he "couldn't let go." His "whole body just started tightening up" and "all of a sudden she just fell." See Initial Brief of Appellant at 15-17. There was no evidence Fuce verbally or physically resisted Robertson's actions. According to the medical examiner, she could have lost consciousness within seconds. There were no actions by Fuce, therefore, from which the jury could infer a withdrawal of consent to enter. Even if Fuce had resisted Robertson's actions, such resistance would not necessarily have meant a withdrawal of consent to remain on the premises; it could just as likely have meant she wanted him to stop what he was doing. Accordingly, the charge of burglary

cannot be sustained even if this Court applies the legal fiction adopted in Ray.

Allowing the jury to infer withdrawal of consent under the circumstances presented here reaches beyond a reasonable inference to the level of an unconstitutional presumption. For a permissive inference to satisfy due process, there must be a rational connection between the basic fact proved and the ultimate fact presumed. County Court of Ulster County v. Allen, 442 U.S. 140, 165, 99 S.Ct. 2213, 2228, 60 L.Ed.2d 777 (1979). Where the proven fact is the sole evidence of the presumed fact, the inference can be upheld only if, given that the initial fact is proven, the presumed fact would follow "beyond a reasonable doubt." See Miller v. Norvell, 775 F.2d 1572, 1575 (11th Cir. 1985), cert. denied, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed.2d 675 (1986). The rationality of the inference is judged not in the abstact but in light of the circumstances giving rise to the inference in the particular case. Ulster County, 442 U.S. at 162-63.

Although the inference of withdrawal of consent from the commission of a crime may be permissible in some circumstances, the inference cannot withstand the "beyond a reasonable doubt" test here. Nor can the inference withstand the substantial and

competent evidence test,[5] for it lacks evidentiary support. It thus becomes a presumption, which cannot supply an essential element of a statutory offense without violating due process. The state must prove every ingredient of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. Patterson v. New York, 432 U.S. 197, 215 (1977). Here, however, the state's proof required a pyramiding of inferences, first that Fuce wanted Robertson to stop what he was doing, and then that she wanted him to leave, withdrawing consent to his presence altogether.

Accordingly, appellant's evidence of consent was sufficient to preclude appellant's conviction of burglary, and that charge cannot stand.

C. The evidence was insufficient to support the aggravating circumstance that the murder was committed during a burglary.

The trial court's finding that Robertson committed the murder during a burglary was based solely on his conviction of

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[5]In order to uphold a verdict on appeal, there must be substantial, competent evidence to support each element of a crime. See Tibbs v. State, 397 So. 2d 1120, 1123 (1981)(concern of appellate court is whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of verdict, there is substantial, competent evidence to support verdict); Heath v. State, 220 So. 2d 436 (Fla. 2d DCA 1969)(competent evidence must be adduced as to each element of criminal offense).

burglary. (R 230). Because the burglary conviction must fall, so, too, must the felony murder aggravating factor. This leaves either zero or one valid aggravating circumstance, depending on whether this this Court strikes the HAC aggravator. See Initial Br. of Appellant, Issue VI. In either event, in light of the substantial and compelling mitigation presented, death is not the appropriate punishment. As appellant argued in his initial brief, this case if very similar to Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), in which this Court concluded the death penalty was not warranted.[6]

[6]Although Nibert stabbed a drinking companion in his home, the state did not charge Nibert with burglary nor seek the burglary aggravator. The only aggravator was heinous, atrocious, or cruel.

Conclusion

For the foregoing reasons, appellant respectfully asks this Court to reverse his conviction and sentence for burglary with assault, 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, on this 19th day of February, 1996.

NADA M. CAREY