

SUPREME COURT OF FLORIDA

CASE NO. 88,638

JESUS DELGADO,

Appellant,

-vs.-

THE STATE OF FLORIDA,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This is a direct appeal from the Defendant's convictions on two counts of first degree murder and the crime of burglary. The indictment charged the Defendant with first degree premeditated murder or first degree felony murder, with the only underlying felony charged in the indictment as burglary. The indictment specifically charged that the Defendant committed the alleged burglary by entering into the victim's residence unlawfully with the intent to commit enumerated offense of murder. Mr. Delgado was not charged with entering into the dwelling with the intent to steal, or with the intent to commit an assault, or for any other unlawful purpose. The trial court instructed the jury that the offense of burglary had three elements: presence within the premises, absence of permission, and that "[a]t the time of entering or remaining in the structure the defendant had a fully-form[ed], and conscious intent to commit the offense of murder in that structure." Tr.1513.

At trial, the only evidence presented by the State in support of its theory of felony murder is that the Defendant consensually entered into the dwelling with the intent to kill the victims, and remained therein after consent was allegedly withdrawn. See Tr.1384. At no time during the trial did the State introduce any evidence that the Defendant entered into the victims' dwelling surreptitiously, or by breaking and entering, or in any manner other than with the consent of the victims. The State's theory of burglary was that, when the Defendant allegedly attempted to kill the victims, their consent to his presence on the property was withdrawn. Tr.1384.

The jury returned a general verdict of guilty on the two murder counts, so it is impossible to determine whether the jury found the Defendant guilty of premeditated murder or guilty of felony murder. See Tr.1543.

Appellant otherwise adopts and incorporates the Statement of the Case and of the Facts from his Corrected Initial Brief, as if set forth at length herein.

SUMMARY OF THE ARGUMENT

Appellant's convictions of murder must be reversed, because it is possible that the jury convicted him on the State's theory of felony murder, which was presented on the legally-insufficient theory that a burglary occurred when the Defendant failed to depart the victim's premises, after consent to his presence allegedly was impliedly withdrawn. This Court has held that the crime of burglary cannot be established where the Defendant is lawfully on the premises, on a theory that--upon commission of a crime therein-- consent to his presence has been withdrawn, or a burglary would ipso facto result wherever a crime was committed on private property.

Because the case was submitted to the jury on a general verdict, and because the verdict could have been based upon this legally-insufficient felony murder theory, the convictions for first degree murder must be reversed.

Defendant's conviction of burglary also must be reversed there was no evidence that the victim's consent to Mr. Delgado's presence on their property was withdrawn.

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR MURDER MUST BE REVERSED BECAUSE THE CASE WAS SUBMITTED ON THE LEGALLY-INSUFFICIENT ALTERNATIVE THEORY OF FELONY MURDER

This case was tried by the State on the alternative theories that the Defendant committed premeditated murders of the two victims, or committed felony murders with the only underlying felony being burglary. Mr. Delgado was not charged with breaking and entering into the victims' dwelling, nor was there any evidence that he entered the premises unlawfully. To the contrary, the State's entire theory of the events was that the Defendant was lawfully on the premises, but that the victims' consent to his presence was impliedly withdrawn when the altercation between them commenced.

There was no evidence which would support a finding that the Defendant was on the premises other than with the consent of the victims. There was a business relationship between the parties, no evidence of forced entry, and no other evidence that Mr. Delgado entered the premises other than by invitation.

The State expressly tried this case on the theory that the consent given to the Defendant to be upon the premises was withdrawn when the altercation occurred which led to the deaths of the victims. However, that theory of burglary is legally-insufficient, because there must be evidence of the lack of consent to a Defendant's presence on the property other than the implied withdrawal of consent from the fact that a crime occurs.

This Court addressed the issue in Miller v. State of Florida, 23 Fla. L. Weekly S389 (Fla. 1998). In Miller, this Court reversed the Defendant's burglary conviction (and his death sentence where burglary was an aggravator on the murder conviction which led to that death sentence). In Miller, the State's only theory of burglary was that the Defendant was lawfully on the premises, but that the victim's consent to his presence was withdrawn when the killing occurred. This Court held that, to allow a burglary conviction wherever the Defendant was initially lawfully on premises without any evidence that consent was withdrawn--other than the fact that a crime occurred--was an inappropriate construction of the burglary statute.

If a burglary could be found by a jury in the absence of some other evidence of the absence of permission for the Defendant's presence on the premises, then a burglary would be committed any time there is a crime on private property. This Court held that "[t]here must be some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred." Id. at S390. No such evidence was present in this case, so the Defendant's conviction of burglary was legally-insufficient.

Mr. Delgado's conviction of murder must be reversed because the case was submitted to the jury on a general verdict and it is quite likely that the conviction resulted from the finding of guilt on the legally-insufficient underlying offense of burglary. In Yates v. United States, 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957), "the Court held that a conviction under a general verdict is improper when it rests on multiple bases, on of which is legally inadequate." Tricarico v. State of Florida, 711 So. 2d 624 (Fla. 4th DCA 1998). This is not a case in which the conviction of burglary was factually insufficient, but

was legally-insufficient because it rested upon a theory of lack of consent which cannot exist under the law.

The State cannot demonstrate beyond any reasonable doubt the harmlessness of the error in this matter. Defendant's convictions of burglary and first degree murder must be reversed. Appellant otherwise adopts and incorporates the arguments and authorities set forth in his corrected Initial Brief.

II.

APPELLANT'S CONVICTION FOR BURGLARY MUST LIKEWISE BE REVERSED BECAUSE THERE WAS NO EVIDENCE OF WITHDRAWAL OF CONSENT

For the foregoing reasons, Appellant's burglary conviction should be reversed.

CONCLUSION

WHEREFORE, the Defendant's murder convictions and burglary convictions resting upon a legally-insufficient theory that burglary can occur, even in the absence of any evidence that consent to presence was withdrawn, the convictions should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was served via hand delivery, upon Fariba N. Komeily, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this, the 6th day of August, 1998.

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