IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,638

JESUS DELGADO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State objects to the Appellant's Statement of the Case and Facts in the Supplemental Brief which contains legal arguments and conclusions. Moreover, the Appellant's assertion that, "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. . .," is without record support. "Tr. 1384," relied upon by the Appellant, reflects an alternative legal argument made by the prosecution to the trial judge, outside the presence of the jury. The evidentiary presentation and arguments to the jury clearly reflect that the state also argued lack of consensual entry. See, e.g., T. 1439-41. The State otherwise relies upon its Statement of the Case and Facts in the Answer Brief of Appellee.

SUMMARY OF ARGUMENT

The Appellant's convictions for first degree murder and burglary are valid. The Appellant's reliance on this Court's recent, and as yet non-final, decision in Miller v. State, 23 Fla. L. Weekly S389 (Fla. July 16, 1998), is unwarranted, as the facts of the instant case are clearly distinguishable from those in Miller. Very simply, the instant case involved the victims' residence, for which there was no evidence of a licensed or consensual entry by the defendant. Furthermore, the physical evidence reflected the existence of a horrific struggle by the victims, which would further reflect the withdrawal of any prior consent to enter. Thus, the evidence as to burglary was sufficient.

As to the first-degree murder conviction, even if the felony murder theory is inapplicable, the evidence of premeditated murder provides ample support for the convictions herein. The general verdict would be sufficient as to that alternative theory of murder, as a general verdict is insufficient only when it is predicated, in part, on an improper theory of law. At worst, the felony-murder theory is one of insufficient evidence; it is not an

improper legal theory.

ARGUMENT

I and II. APPELLANT'S CONVICTIONS FOR FIRST DEGREE MURDER AND BURGLARY ARE VALID.

The defendant was convicted of two (2) counts of first degree murder, based upon alternative theories of premeditation and felony murder (during the course of a burglary). The defendant was also separately charged with and found guilty of the burglary of the victims' residence. The sufficiency of the evidence of premeditated first degree murder has been addressed in issue III of the Answer Brief of Appellee, at pp. 37-45, inclusive, and is relied upon herein. The Appellant contends, however, that these convictions should be reversed because, pursuant to Miller v. State, 23 Fla. L. Weekly S389 (Fla. July 16, 1998),[1] there was insufficient evidence of burglary and the "general verdict is improper when it rests on multiple bases, one of which is legally inadequate," under Yates v. United States, 354 U.S. 298, 1 L.Ed. 2d 1356, 77 S.Ct. 1064 (1957). See Appellant's Supplemental Brief, at pp. 3-4. The instant case, unlike Miller, involves the victims' residence, not commercial premises. The victims' residence was not open to the public and the defendant was not invited nor licensed

[1] Miller is not final as it is currently pending on a motion for rehearing, filed by the State, on July 31, 1998.

to enter same. Moreover, there was ample evidence of the victim-owners' struggle during the course of the defendant's vicious attack on them, so as to provide sufficient proof that the victims withdrew whatever consent/invitation they may have given the defendant. Finally, assuming arguendo, that the proof of burglary is deemed insufficient, there was sufficient proof of the alternative theory of premeditation, such that defendant's convictions for first degree murder must be upheld pursuant to Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed. 2d 371 (1991); Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed. 2d 610 (1970); Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed. 2d 326 (1992), and Miller, supra.

In Miller, the defendant and his nephew entered a grocery store during normal business hours. 23 Fla. L. Weekly at S389. Miller pointed a gun at the security guard victim while Miller's nephew disarmed this victim. This Court noted that a gunshot was then heard, whereupon the victim security guard was killed. Miller's nephew then "accidentally" shot the owner of the store, who survived. Miller then took money from the store's cash register and left. Id. This Court noted that Fla. Stat. 810.02(1) (1993), defines burglary as:

> Burglary means entering or remaining in 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.

23 Fla. L. Weekly at S390. This Court then held that there was insufficient evidence of burglary, as, "Here, there is no evidence that the grocery store was not open; therefore Miller was 'licensed or invited to enter.'" Id. This Court added:

> To allow a conviction of burglary based on the facts in this case would erode the consent section of the statute to a point where it was surplusage: every time there was a crime in a structure open to the public committed with the requisite intent upon an aware victim, the perpetrator would automatically be guilty of burglary. This is not an appropriate construction of the statute.
>
> Here the argument was geared towards showing that Miller did not have consent to enter the grocery store to commit a crime. Clearly, the store was open, so Miller entered the store legally. There was no attempt to show - even through circumstantial evidence - that although Miller entered the store legally, consent was withdrawn.

Id. This Court reversed Miller's burglary conviction, but nonetheless upheld his conviction for first degree murder, based upon the sufficiency of proof of the alternative theories of murder presented by the State.

In contrast to Miller, the instant case does not involve commercial premises which were open to the public at the time of the murders. The murders herein were committed inside the victims' home. The victims' residence was not a commercial grocery store open to the public and the defendant was neither licensed nor invited to enter the home. Miller is thus not applicable to the instant case. The Appellant's argument that there was a "business relationship between the parties," is entirely without merit. The uncontroverted evidence herein reflects that the victims had, months prior to their murders, sold a dry cleaning business, located miles away from their house, to the defendant's girlfriend's father. The State respectfully submits that there is no basis in law, and no factual theory presented at trial, where one's home and residence is converted to commercial premises open to the public, by virtue of one's sale of a separate business to an acquaintance of the defendant's. Nor can it be said that a sale of one's business is an invitation or license for acquaintances of the buyer to enter the seller's house. Appellant's reliance upon Miller is thus unwarranted.

Furthermore, this Court has repeatedly and consistently held that consent to entry or remaining is an "affirmative defense," not

an "essential element" of the crime of burglary. State v. Hicks, 421 So. 2d 510 (Fla. 1982). "The critical element in both the prior and present [Florida] burglary statutes is that a Defendant enter or remain in the premises 'with the intent to commit an offense therein.'" 421 So. 2d at 512; See also, Routly v. State, 440 So. 2d 1257, 1262 (Fla. 1983), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed. 2d 868 (1984) ("The burglary statute is satisfied when the Defendant 'remains in' a structure with the intent to commit an offense therein. Hence the unlawful entry is not a requisite element.'"); Jimenez v. State, 703 So. 2d 437, 440 (Fla. 1997) ("Neither forced entry nor entry without consent are requisite elements of the burglary statute."); Robertson v. State, 699 So. 2d 1143 (Fla. 1997) (the burglary statute "makes consent an affirmative defense to a charge of burglary"); Raleigh v. State, 705 So. 2d 1324 (Fla. 1997) (same).

In the instant case, the defendant failed to establish the affirmative defense of consensual entry. The evidence herein was uncontroverted that the victims were extremely security conscious and always kept the doors to their residence locked. The physical evidence established that the victims' keys were still inside the lock to the normally locked entry gateway to their house, after

their bodies were found in their garage. The entry living areas from the front entry gateway were in immaculate and undisturbed condition, with no signs of any social gathering nor a struggle. The first signs of any disturbance were in the back of the living areas where the wooden door to the garage was broken. The victims' bodies, shot and stabbed, were found inside the garage. This evidence reflected that the victims, upon having unlocked their front entry gate, had been immediately marched, at gun point, back inside their house and to the garage area where they were killed after a struggle; they had not even had the chance to retrieve their keys or relock the doors.[2] The State respectfully submits that merely unlocking the door to one's house, whereupon one is forced back inside at gunpoint, does not establish consent or an invitation for entry. There was no evidence of consent, invitation or license for the defendant to enter the victims' house.

Moreover, even if the act of unlocking one's door is deemed to constitute a consensual entry, the State in the instant case satisfied its burden of establishing that the victims withdrew whatever consent they may have given the defendant to enter their

[2] The prosecution emphatically argued this theory to the jury. (T. 1439-42).

home. Unlike Miller, supra, the evidence herein reflected a struggle between the victims and the defendant. As noted previously, the door leading to the garage where the victims' bodies were found had been broken. The hinges to the door were broken and there was a crack in the center of the door, consistent with someone having pushed against the door. (T. 683-84, 735-36). Furthermore, the physical evidence of the manner of deaths established withdrawal of any possible consent. Victim Tomas Rodriguez had first been shot in the chest and legs at least five (5) times. His wife, Violetta, was then beaten by the butt of the same gun, now empty of bullets, so viciously that she had suffered four (4) separate skull fractures and the skull bone was pushed back to the inside of her brain. The defendant had then retrieved a knife from the victims' kitchen and stabbed Tomas five (5) times in the neck and chest area, although the latter was incapable of movement due to the gunshot wounds. Violetta had also been stabbed, twelve (12) times, and in the vital organs. There was also evidence of numerous defensive injuries. This Court has repeatedly and consistently held such evidence of a victim's struggle to constitute ample proof of withdrawal of whatever initial consent may have been given. Jimenez, supra, at 440 ("In the instant case, we conclude that the trier of fact could

reasonably have found proof of withdrawal of consent beyond a reasonable doubt. There is ample circumstantial evidence from which the jury could conclude that [victim] withdrew whatever consent she may have given for [Defendant] to remain, when he brutally beat her and stabbed her multiple times. . . .”); Raleigh, supra, at 1329 (“. . . ample circumstantial evidence from which the jury could conclude that [victim] withdrew whatever consent he may have given for [Defendant] to remain when Raleigh shot him several times and beat him so viciously that his gun was left bent, broken, and bloody.”); Robertson, supra (same); see also, Ray v. State, 522 So. 2d 963, 966 (Fla. 3d DCA 1988) (“we agree with the State that [victim] Bryant’s struggle with the Defendant was sufficient evidence that she withdrew her consent to Ray’s remaining in the premises, making his remaining in the premises after the withdrawal a burglary.”).

In sum, there was ample proof of burglary in the instant case. Assuming, arguendo, that this Court deems the proof of burglary to be insufficient, the State respectfully submits that the convictions of first degree murder should nevertheless be upheld,

based upon proof of the alternative theory of premeditation.[3] See, Griffin v. United States, 502 U.S. at 49-50 ("It was settled law in England before the Declaration of Independence, and in this Country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds. . . . '[i]t is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts can not be reversed on error, if any one of the counts is good and warrants the judgment'. . . .", quoting Claasen v. United States, 142 U.S. 140, 146, 12 S.Ct. 169, 170, 35 L.Ed. 2d 966 (1891)). These general rules are deemed applicable to and validated "a general jury verdict under a *single* count charging the commission of an offense by two or more means."); Turner v. United States, 396 U.S. at 420 ("[w]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged."); Sochor v. Florida, 504 U.S. at 538 ("Sochor implicitly suggests that, if the jury was allowed to rely on any two or more independent grounds, one of which is

[3] As noted previously, the overwhelming evidence of premeditation has been fully addressed in issue III of the State's Answer Brief, at pp. 37-45, and is relied upon herein.

infirm, we should presume that the resulting verdict rested on the infirm ground and must be set aside. [citation omitted]. Just this Term, however, we held it was no violation of due process that a trial court instructed a jury on two different legal theories, one supported by the evidence, the other not. See Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed. 2d 371 (1991). We reasoned that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence. [citation omitted]. We see no occasion for different reasoning here, and accordingly decline to presume jury error."). The Appellant's reliance upon Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed. 2d 1356 (1957), is unwarranted. The United States Supreme Court has held that Yates is only applicable to situations where there is a "mistake about the law," as opposed to "insufficiency of proof." Griffin, 502 U.S. at 58-59. The Appellant, while arguing and conceding that there was no "evidence" of lack of consent, nonetheless contends that the burglary conviction herein should be deemed "legally insufficient." Appellant's Supplemental Brief at pp. 4-5. This "semantic" recasting of "insufficiency of proof" or evidence in terms of "legal error" or "constitutional" error within the purview of Yates, has, however, been expressly rejected by the Court. 502 U.S.

at 58-59. As noted in Miller, relied upon by the Appellant, this court in no way invalidated the burglary statute, nor did it find any legal or constitutional infirmity therein. This Court only held that there was no evidentiary support or proof for the burglary in that case: "There was no attempt to show -- even through circumstantial evidence -- that although Miller entered the store legally, consent was withdrawn. There must be some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred. Not only do we not find any such evidence, we note that there was none argued by the State. Accordingly, we reverse Miller's burglary conviction." 23 Fla. L. Weekly at S391. Indeed, despite reversing the burglary conviction, this court upheld Miller's first degree murder conviction based upon sufficient proof of independent legal theories of murder. See also, Terry v. State, 668 So. 2d 954, 964-65 (Fla. 1996) (conviction for first degree murder upheld where although there was insufficient evidence of premeditated first degree murder, this court found sufficient evidence of alternative theory of felony murder).

CONCLUSION

Based upon the foregoing, the defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief of Appellee was mailed and faxed this _____ day of August, 1998, to ROY D. WASSON, Esq., Suite 450 Gables One Tower, 1320 South Dixie Highway, Miami, Florida 33146.

FARIBA N. KOMEILY